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CABLE COMES OF AGE: A CONSTITUTIONAL ANALYSIS OF THE REGULATION OF "INDECENT" CABLE TELEVISION PROGRAMMING

BY LYNN D. WARDLE[1]

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1. Professor of Law, J. Reuben Clark Law School, Brigham Young University. The author is indebted to Sheila Burger, Bryan Husted, and Jim Lundberg for their valuable research assistance, and to Professor Robert Riggs for his valuable criticism.

INTRODUCTION

The explosive growth of the cable television industry in the United States during the past two decades has engendered a provocative new social dilemma: the transmission of sexually explicit programs over cable into communities and homes where cable television is desired, but sexually explicit programming is not. Legislation designed to respond to this problem has stimulated litigation raising an important question of constitutional law: Does state and local regulation of nonobscene, but indecent, sexually explicit programming over cable television violate the first amendment or the supremacy clause of the Constitution? The purpose of this article is to review the cases and commentaries which have addressed this issue and to propose a model of analysis for assessing the constitutionality of cable television indecency regulations. The article leads to two important, albeit unexpected, conclusions. First, reasonable regulation of sexually explicit indecent cable television programming is permissible under the first amendment. Second, state and local indecency regulations are not preempted by federal law.

Part I of this article describes the societal context in which the constitutional question arises, including the recent growth of cable television and of sexually explicit cable programming, the public controversy

over sexually explicit "indecent" cable programming, and the enactment of laws regulating sexually explicit cable programming. Part II contains a review and criticism of the cases and commentaries which analyze whether laws regulating nonobscene, but indecent, cable television programming are constitutional. Part III presents and applies a model of first amendment analysis for assessing the constitutionality of cable television indecency regulations. Part IV examines whether state and local regulation of indecent cable television programming violates the supremacy clause of the Constitution, and explains why state and local cable indecency regulations are not preempted.

I. THE COMING OF AGE OF CABLE TELEVISION

A. *The Rise of Cable Television and Indecent Cable Programming*

Cable television has experienced incredible growth during the past two decades. In 1963, two decades after the first cable television system began operating in this country,[2] there were approximately 1,000 cable television systems in operation serving approximately 950,000 subscribers.[3] By 1973, more than 2,900 cable systems were in operation serving approximately 7.3 million subscribers.[4] In just ten years the number of cable television systems had increased by nearly thirty percent and the number of subscribers had grown by more than 700 percent. During the next decade the number of cable systems again doubled; the number of subscribers quadrupled. By mid-1983 there were 5,748 cable television systems in operation in the United States serving an estimated 31.7 million subscribers.[5]

In the same year, cable "penetration" reached 38 percent of all homes with television sets in the United States.[6] By January, 1985, cable penetration was at 43.7 percent, viewed in more than 37.2 million homes.[7] It is estimated that cable penetration will reach fifty percent by 1988.[8]

Of course, the financial investments in the cable television industry and the potential return on those investments are staggering. In 1984, cable operators spent $1.138 billion to build, rebuild and upgrade cable plants.[9] That same year, however, cable system operating revenues to-

2. REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 24 (1971) [hereinafter cited as SLOAN COMM'N REP.].

3. TELEVISION DIGEST, INC. TELEVISION & CABLE FACTBOOK NO. 52, CABLE & SERVICE VOLUME 1735 (1984) [hereinafter cited as TELEVISION & CABLE FACTBOOK.]

4. *Id.*

5. Smith, *Reporter's Notebook: Cable Meeting*, N.Y. Times, June 18, 1983, § 4, at 48, col. 5 [hereinafter cited as Smith, *Reporter's Notebook*]. *See also Hooking Up to Cable Households*, TIME, Apr. 18, 1983, at 68. By mid-1984 there were 6,400 cable television systems in operation in the United States. TELEVISION & CABLE FACTBOOK, *supra* note 3, at 1735.

6. Smith, *Reporter's Notebook*, *supra* note 5, § 4, at 48, col. 4. *See also Nielsen Charts Cable Universe at 35% Penetration*, BROADCASTING, Jan. 10, 1983, at 92.

7. *Nielsen: U.S. Penetration Reaches 43.7 Percent*, CABLEVISION, Jan. 14, 1985, at 17.

8. *Cable Industry Growth Chart*, CABLEVISION, May 13, 1985, at 48.

9. Dawson & Capuzzi, *Slow but Steady: The New Era in CATV Construction*, CABLEVISION, Mar. 4, 1985, at 30.

talled $8.4 billion[10] and industry profits reached $600 million.[11] A 1984 study of 226 companies involved in ten different segments of the communications industry revealed that cable and pay television led all other segments of the industry in overall financial performance in 1983.[12]

Today cable television system operators can offer subscribers dozens of television channels, clear cable delivery of broadcast television channels, programs produced by the local cable system, and exclusive entertainment and information channels produced for cable television by independent "cable networks." In 1982, forty-seven different cable "networks" offered a variety of specialty programming channels to local cable system operators, including: all-sports, all-news, all-music, children's entertainment, religious programming, Spanish language programming, ethnic-oriented programming, family-oriented entertainment, variety entertainment, first-run movies and sexually-oriented programming.[13] More than sixty additional cable networks are currently being planned.[14]

The exploitation of sexual programming to attract subscribers has been almost as dramatic as the growth of cable television. Initially, cable systems functioned primarily to facilitate reception of broadcast television in areas where residential antenna reception was poor.[15] Sexually explicit programming was not a significant problem because federal law forbids obscene or indecent utterances on broadcast television.[16] The key, however, to the recent growth of the cable television industry has been its ability to offer alternative programming not available on broadcast television, which traditionally has been largely unregulated.[17]

10. Kahn, *Study Predicts Cable Industry to Flourish*, CABLEVISION, June 10, 1985, at 11.

11. In 1985 it was predicted that industry revenues in 1990 would exceed $16 billion and profits would reach $1.7 billion annually. The prospects for healthy returns on cable television system investments remain very promising. *Id.*; *see also* Roberts, *Financial Aspects of Cable Television in a New Era* in CABLE TELEVISION IN A NEW ERA 51 (P.L.I. 1983).

12. The survey found that cable and pay TV led all other segments of the communications industry in compound annual growth between 1979 and 1983. In 1983, cable's revenue growth rate was more than twice that of the next highest group, which was the advertising segment. In 1983, the cable segment ranked in the top three in all other measures of growth. Its operating margins were the second best in the communications industry; its cash flow margins were the best. Russell, *Cable, Pay TV Lead the Pack in Growth Rate*, CABLEVISION, Dec. 17, 1984, at 36. According to the report, cable and pay television companies achieved compound annual revenue growth of 45.1 percent in the period between 1979 and 1983. *Id.*

13. Wheeler, *Cable Television: Where It's Been, Where It's Headed*, 56 FLA. BAR J. 228, 230 (1983). *See generally* Waters, *Cable TV: Coming of Age*, NEWSWEEK, Aug. 24, 1981, at 44 [hereinafter cited as Waters, *Coming of Age*].

14. Davis, *Current Regulatory Changes and Business Developments in the United States Communications Industry*, 158 PRACTICING LAW INSTITUTE 9, 40 (1983).

15. SLOAN COMM'N REP., *supra* note 2, at 24.

16. 18 U.S.C. § 1464 (1982) provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

17. Significant restrictions on the authority of the Federal Communications Commission (the FCC) to regulate the cable television industry were articulated in a series of Supreme Court cases construing the federal statutes which define the regulatory authority of the FCC. *See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 689 (1979); United States v. Midwest Video Corp., 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The FCC's jurisdiction over cable is limited to that "reasonably ancillary

Thus, largely unhampered by federal regulations,[18] some cable system operators have opted to exploit sexual programming for profit.

For the most part, obscene "hard-core" pornography has not been shown on public cable television systems, but "soft-porn" has been available on cable television in a variety of formats. On a few local cable systems, notably in New York City, basic cable service has included such programs as "Midnight Blue" which features "topless dancers, sado-masochistic skits and visits to nudist colonies featuring full frontal exposure,"[19] "Men and Films" which features "takeouts from gay movies,"[20] and "The Ugly George Hour of Truth, Sex and Violence" in which "a former porn-film actor . . . roams the city with a portable videotape camera, brashly inviting strange women to come to his studio and disrobe before his lens."[21] Additionally, at least six "cable networks" purportedly feature exclusively sexual programming.[22] In 1983, sex-network channels were available as an extra-tier, additional charge service, in 2,000,000 homes over cable television. Some cable television systems even feature hard-core, "X-rated" movies.[23]

The major source of sexually explicit cable programming, however, is not the basic local access channels or even the sex-networks but the

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to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 178.

It is important to note that these restrictions are statutory. In October, 1984, Congress enacted the Cable Communications Policy Act of 1984 which, *inter alia*, prohibits the transmission over cable television of "any matter which is obscene or otherwise unprotected by the Constitution. . . ." Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 639, 98 Stat. 2780, 2801; *see infra* notes 344-410 and accompanying text. The contrasts between the regulation and sexual exploitation of broadcast and cable television programming are noted in ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 282-83 (1986).

18. This is not to say that the cable industry has been totally unregulated in other respects. In fact, the absence of preempting federal regulations of the cable television industry created a void which agencies of state and local governments rushed to fill. The resulting patchwork quilt of confusing, sometimes overlapping, often inconsistent, local regulations is one of the primary reasons the Cable Communications Policy Act of 1984 was enacted. S. REP. No. 67, 98th Cong., 1st Sess. 4-11 (1983); *see infra* notes 349-414 and accompanying text.

19. *See infra* note 21.

20. Weinstein, *Sex and Cable*, CABLEVISION, Feb. 11, 1985, at 28, 32. The utilization of high-tech telecommunications systems to convey sexually explicit programming was not entirely unanticipated. For an intriguing and amusing literary forecast, see A. Clarke, *I Remember Babylon*, in TALES OF TEN WORLDS 7 (1964).

21. Gunther, *Pay TV Sex: How Far Can It Go?*, TV GUIDE, Mar. 28, 1981, at 4, 5; Waters, *Cable's Blues in the Night*, NEWSWEEK, Aug. 24, 1981, at 48 [hereinafter cited as Waters, *Cable's Blues*].

22. *Id*; *see also* Smith, *Battle Intensifying Over Explicit Sex on Cable TV*, N.Y. Times, Oct. 3, 1983, at A1, col. 1 [hereinafter cited as Smith, *Battle Intensifying*]. The largest of the cable TV sex-networks, the Playboy Channel, had 500,000 subscribers and was available on 275 cable systems in 1983. *Id.* at C22, col. 2. By October, 1984, Playboy reportedly had 457 affiliates with 720,000 subscribers. Taub, *Brandman Named to Head Playboy Programs Inc.*, CABLEVISION, Oct. 29, 1984, at 11.

23. The National Cable Television Association claims that only about a half-dozen cable systems show X-rated films. Smith, *Battle Intensifying*, *supra* note 22, at C22, col. 2. In 1985, an industry spokesperson reported that out of over 35 million total cable subscribers there were only 700,000 subscribers to channels offering X-rated films. Ross, *Pornography Panel Hears Fox Testimony*, CABLEVISION, Oct. 28, 1985, at 30.

"all-around" movie channels such as Home Box Office (HBO) and Showtime, which are generally available as an "extra" channel for an additional fee. These popular general movie channels regularly feature movies which explicitly portray nude men and women, heterosexual lovemaking and homosexual activity.[24] In fact, forty percent of the movies shown by HBO on cable TV are reportedly rated "R."[25] Moreover, the sexual programming on these channels is not limited to movies. Showtime, for example, has offered "A New Day in Eden," described as "a soap opera with nudity."[26] HBO has presented such documentaries as "Strippers," described by one television critic as "a mindless diversion that provides a convenient showcase for assorted bumps, grinds and bare breasts."[27] Lifetime offers "Good Sex" which features Dr. Ruth Westheimer "bubbling over with talk about penises and ejaculations" and preaching that "everything will be all right if you're open and honest and have a good orgasm."[28]

B. *The Public Controversy and Political Reaction*

Not unexpectedly, the offering of sexually-explicit programming over public cable television has generated considerable controversy.[29] A substantial number of the television-viewing adults who desire the educational, cultural and entertainment advantages of cable television are kept from subscribing to cable television services because they do not want to invite sexually explicit programming into their homes.[30] By

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24. Smith, *Battle Intensifying supra* note 22, at A1, col. 2; *see also* Weinstein, *supra* note 20, at 30.

25. Smith, *Battle Intensifying*, *supra* note 22, at C22, col. 4.

26. *Id.* at A1, col. 4.

27. O'Connor, *Cable Displays a Growing Eagerness to Titillate*, N.Y. Times, Apr. 17, 1983, § 2, at 25, col. 4.

28. DiMatteo, *'Good Sex': Not Good Enough*, CABLEVISION, Sept. 17, 1984, at 24. The pronounced sexual programming on cable television arguably has had a deleterious impact on broadcast television as well. New York Times television critic John O'Connor has charged that broadcast television programs have become more sexually explicit in order to compete with the pandering fare offered on cable. O'Connor, *The Networks Flirt With Sexual Explicitness*, N.Y. Times, Oct. 9, 1983, § 2, at 37, col. 1; *see also* Gunther, *supra* note 21, at 6, 7.

29. *See generally* Waters, *Cable's Blues*, *supra* note 21; Waters, *Coming of Age*, *supra* note 13, at 46; Smith, *Battle Intensifying*, *supra* note 22, at A1, col. 1; Gunther, *supra*, note 21, at 5.

In 1973 the FCC reported that the number of complaints about cable and broadcast stations presenting offensive programming had jumped nearly thirty-fold in the past two years. *In re* Sonderling Broadcasting Corp., 41 F.C.C.2d 777, 778 n.5 (1973).

30. Two studies done since 1980 found, respectively, that 25% and 33% of the persons surveyed "said they did not subscribe to [cable television] services because they did not want their children exposed to some of its programming." Smith, *Battle Intensifying*, *supra* note 22, at C22, col. 4. Even viewers of cable TV "adult programming" believe that it is too explicit.

> *On Cable* magazine conducted two surveys in March on attitudes about adult programming on cable. One measured attitudes among adults in 506 cable households, the other focused only on attitudes among adults in 484 cable households viewing adult programming. According to the results, viewers of the racier fare closely agreed with their non-viewing counterparts . . . [a]dult programming, the majority agreed, should be less explicit. Of the total 990 respondents, 66 percent of the [general cable viewers thought] adult-programs should turn down the steam; 65 percent of adult-viewers agreed. Both surveys revealed the major-

1983, it was reported that approximately 100 citizen groups around the country were attempting to ban or curb indecent or obscene programming on cable television.[31] Legislation intended to curb the perceived problem of "cableporn" has been proposed, and some of it enacted, by federal,[32] state,[33] and local lawmakers.[34] Cable operators have been indicted for violating obscenity laws.[35] Popular initiative petitions or referenda have raised the issue in some communities.[36] Congressional hearings have addressed the subject,[37] and in 1985 the Justice Department appointed a national commission to assess the problem. The commission released its report in July of 1986.[38]

At least nine states and Congress have enacted laws designed to deal with indecent cable television programming.[39] Most of this legislation has been enacted since 1980. These laws reflect six different approaches to dealing with the problem of sexually explicit cable programming: (1) criminal statutes punishing the knowing distribution of indecent material over cable television systems;[40] (2) nuisance statues imposing "time, place and manner" standards on cable programming;[41] (3) statutes requiring cable system operators to provide "lockboxes" to their customers;[42] (4) statutes authorizing municipalities or other gov-

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ity of cable viewers prefer a separate channel for adult material, and indicated a preference for local communities to establish adult-programming standards. *Some Like It Hot, But Won't Tell*, CABLEVISION May 14, 1984, at 12 [hereinafter cited as "Some Like It Hot"].

31. *Id.* at C22, col. 5.

32. *See infra*, pp. 627-628 and 679-81.

33. *See infra*, pp. 627-628 and 679.

34. *See infra*, pp. 627-628 and 679.

35. *See infra* notes 334-36 and accompanying text.

36. *See* Weinstein, *supra* note 20, at 29; *see also infra* notes 120 and 332.

37. S. 1090, 99th Cong., 1st Sess., 131 CONG. REC. 5542-48 (1985); *see* Wolfe, *Senators Blame Cable for "Pornography Invasion,"* CABLEVISION, Aug. 12, 1985, at 24; *see also infra* notes 337-40.

38. *Pornography Commission Formed*, CABLEVISION, May 27, 1985, at 15. In 1986 this Commission published its report, a two-volume, 2000-page compilation entitled: ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986). The report criticized the sexually-oriented programming on cable television as"highly explicit and offensive to many." *Id.* at 283. The report also recommended that Congress enact tougher restrictions against the transmission of obscene material via cable television. *Id.* at 434. The Commission also considered proposals that nonobscene but indecent sexually explicit programming should be banned from cable television, but was "deeply divided" about what type of regulation, if any, was most appropriate. "[A]s a result there is no consensus among us that would justify urging the regulation of cable encompassing more than the legally obscene." *Id.* at 400; *see generally id.* at 398-400.

39. The states include Arizona, California, Kansas, New Jersey, New York, Rhode Island (since repealed), South Dakota, Utah and Wisconsin; *see infra* notes 40-45 and 341-43 and accompanying text.

40. UTAH CODE ANN. § 76-10-1229 (Supp. 1983) (invalidated in Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 986 (D. Utah 1982)); *see also* Cable Communications Policy Act of 1984, § 639, 47 U.S.C. 559; § 601, 47 U.S.C. 521 (1984).

41. UTAH CODE ANN. § 76-10-1701 to -1708 (Supp. 1983).

42. A "lockbox" is an electronic scrambling device which may be attached to a cable-connected television set to prevent video reception of specific channels unless a key is inserted or a code entered. Cable Communication Policy Act of 1984, § 601, 47 U.S.C. 544 (1984). CAL. GOV'T CODE § 53006.4 (West Supp. 1984) (cost to subscribers set at 50 cents per month); N.Y. EXEC. LAW § 829-1 (McKinney 1982) (cost plus 15%); WIS. STAT. ANN. § 134.43 (West Supp. 1983) (no extra fee); *see infra* note 235 and accompanying text.

ernmental units to regulate cable television in the public interest;[43] (5) statutes immunizing cable operators from liability for transmitting indecent programs which they did not originate;[44] and (6) statutes prohibiting state agencies or municipalities from enacting regulations which control the content of cable television programming.[45]

The seriousness of the problem of indecent explicit television programming in the United States is underscored by the fact that it has affected cable television regulation in other countries where the development of cable television is just beginning. For example, the exploitation of sex and violence in "some of the programs receivable without restriction on cable channels in the United States" were specifically criticized as unacceptable in the 1982 report to Parliament investigating the future of British cable television.[46] Six months later, the official White Paper containing the British government's policy recommendations singled out "adult" channels in the United States and Canada as prime examples of the type of cable programming that should have "no place" on cable television in the United Kingdom.[47] Consequently,

43. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §§ 634(d)(1), 638, 98 Stat. 2780, 2797, 2801 (codified at 47 U.S.C.A. §§ 554(d)(1), 558 (West Supp. 1985)); KAN. STAT. ANN. § 12-2006 (1982); S.D. CODIFIED LAWS §§ 9-35-17, 18 (1981); *see also* R.I. GEN. LAWS § 39-19-8 (1977), *repealed by* R.I. GEN. LAWS § 39-19-8 (Supp. 1983)) (statute authorizing revocation of cable operator licenses for originating programs that are "offensive to commonly accepted standards of morality and decency" repealed and replaced with provision authorizing revocation when origination programs which "have been adjudged by a court of competent jurisdiction to be obscene").

44. Cable Communications Policy Act of 1984, §§ 611, 612, 47 U.S.C.A. §§ 531, 532 (West Supp. 1985). N.J. REV. STAT. § 48:5A-50 (Supp. 1983); *see also* N.Y. EXEC. LAW § 830 (McKinney 1982).

45. ARIZ. REV. STAT. ANN. § 9-510 (Supp. 1983); *see also* N.Y. EXEC. LAW § 829 (McKinney 1982).

46. REPORT OF THE INQUIRY INTO CABLE EXPANSION AND BROADCASTING POLICY, CMD, No. 8679, at 24, (1982) [hereinafter cited as CABLE INQUIRY.] While suggesting that the overall amount of regulation of cable television should be much less than the regulation of broadcast television, *id.* at 3, 11, the CABLE INQUIRY concluded that "the traditional broadcasting requirements relating to taste and decency, and the suitability of programmers for children likely to be watching, should be imposed on cable operators," *id.* at 24, for three reasons. First, the CABLE INQUIRY rejected the argument that cable television was analogous to print publication because, *inter alia*, "most people still see the carrying of programmers into the home [by cable television] as different in kind from the act of going out to buy a book or a magazine." *Id.* at 4, 11. Second, the CABLE INQUIRY noted the risk that without decency standards British cable operators would be tempted to show the kinds of unacceptable sexually explicit or violent programs which were being offered in the unregulated American cable television market. *Id.* at 24. Third, the CABLE INQUIRY did not believe "that 'self-regulation' by the cable industry would be generally acceptable at a time when cable is establishing itself and when, for example, there are clearly differing views within the industry itself about the showing of programmes which could be offensive to many people." *Id.* at 4. However, the CABLE INQUIRY recommended that programming on optional extra-cost channels where the subscriber is provided with sophisticated electronic decoders "to lock out of from his set films of censorship categories which are not wanted on the subscription channel for the time, while allowing other categories to be received" should not be subject to the ordinary decency regulations. *Id.* at 24, 25.

47. THE DEVELOPMENT OF CABLE SYSTEMS AND SERVICES, CMD No. 8866, at 57, 137 (1983) [hereinafter cited as WHITE PAPER]. This WHITE PAPER, prepared by the Home Office and the Department of Industry, accepted the CABLE INQUIRY's recommendations that, while cable television programming generally should not be subject to the same degree of regulation as broadcast television, it "should be subject to the same obligations as those observed by the broadcasting organizations . . . that nothing distributed offends

although the Cable and Broadcasting Act enacted by Parliament in 1984 generally implements a broad policy of nonregulation of cable television, a notable exception is that cable television services are required to comply with the same standards of taste, decency and appropriate scheduling applicable to the highly regulated British broadcast television industry.[48]

II. CASES AND COMMENTARY CONSIDERING THE CONSTITUTIONALITY OF LAWS REGULATING NONOBSCENE BUT INDECENT CABLE TELEVISION PROGRAMMING

Although for many years the regulation of other aspects of the cable television industry has been a matter of litigation[49] and scholarly discussion,[50] until 1982 there was virtually no discussion of the constitutionality of attempts to regulate or prohibit cable television systems from transmitting nonobscene, but indecent, sexually explicit material.[51] The

against good taste and decency . . . and to have special regard to programmes broadcast when large numbers or children and young persons are likely to be watching." *Id.* at 56. However the WHITE PAPER rejected the suggestion of the Hunt INQUIRY that decency restrictions need not apply to subscription channels to which access was controlled by electronic locking devices. *Id.* at 57. The government noted "a growing concern that violence and pornography have already established too strong a presence in our society," and that it would be "wholly undesirable if, in the face of [the recent legislative] move towards increased safeguards, cable television was to give a new boost to those who seek to make money out of the exploitation of sex and violence." *Id.* The "so called 'adult' channels" of American cable television were referred to twice: once as an example of the kind of sexually explicit and violent programming that could be expected to develop in Britain "unless specifically prevented," and a second time as an example of precisely the kind of programming which the authorities should not permit on British cable television. *Id.* Thus, the WHITE PAPER concluded that "cable operators should have the same duties in matters such as good taste and decency as those which now apply to [broadcast television], *across the totality of cable channels, with no special exemption for electronically lockable channels.*" *Id.* (emphasis added).

48. The Cable and Broadcasting Act, 1984 ch. 46, § 10, provides, in pertinent part:

> (1) the [Cable] Authority shall do all that they can to secure that every licensed service complies with the following requirements . . . (a) that nothing is included in the programmes which offends against good taste or decency or is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling . . . .

49. *See generally*, FCC v. Midwest Video Corp., 440 U.S. 689 (1979)(access channel regulations; FCC jurisdiction); United States v. Midwest Video Corp., 406 U.S. 649 (1972) (access channel regulations; FCC jurisdiction); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (regulation of local origination and distant signal carriage; FCC jurisdiction); WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982) (stripping vertical blanking interval of teletext information; copyright); Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982) (retransmission of baseball game; copyright exemption), *cert. denied*, 459 U.S. 1226 (1983); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (pay TV programming regulation), *cert. denied*, 434 U.S. 829 (1977); Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) (non-duplication carriage transmission and FCC Procedural Rules; FCC jurisdiction).

50. *See, e.g.*, Kreiss, *Deregulation of Cable Television and the Problem of Access Under First Amendment*, 54 S. CAL. L. REV. 1001 (1981); Davis, *Regulation of Cable Television by the Federal Communications Commission*, CABLE TELEVISION IN A NEW ERA 95 (1983); FORD ADMINISTRATION PAPERS ON REGULATORY REFORM, DEREGULATION OF CABLE TELEVISION (1977); SLOAN COMM'N REP., *supra* note 2, at 5.

51. One student-authored piece published in 1978 (and only mentioning in a footnote the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)) raised the issue but focused on obscenity. Note, *FCC Regulation of Cable Television Content*, 31 Rutgers

issue was obscured by the continuing debate concerning obscenity and the first amendment. Sexually explicit material generally has been categorized as either obscene or nonobscene. Since it is well established that any material that meets the strict *Miller* definition of obscenity may be totally banned from all media,[52] attention has primarily focused on whether cable television programming is obscene. The constitutionality of regulating sexually explicit programming that is not legally obscene but which under community standards is patently offensive and inappropriate for unrestricted transmission to the general public, has been largely overlooked by commentators. There exists only one Supreme Court decision on point, *FCC v. Pacifica Foundation*,[53] which involved the regulation of indecent language broadcast on the radio. It should be noted, however, that the nature of first amendment protection varies depending on the medium of communication.[54]

The constitutionality of regulations restricting the transmission of nonobscene but indecent sexually explicit material over cable television systems is an issue whose time has come.[55] The increasing number of cable television indecency regulations proposed or enacted around the

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L. Rev. 238, 262 n. 158 (1978). However, law review writers were not reluctant to comment on the constitutionality of restricting or prohibiting "indecent" communications in other media. *See, e.g.*, Maltz & Hogue, *On Keeping Pigs out of the Parlor: Speech as Public Nuisance After* FCC v. Pacifica Foundation, 31 S.C.L. REV. 377 (1980); Powe, *American Voodoo: If Television Doesn't Show It Maybe It Won't Exist*, 59 TEX. L. REV. 879 (1981); Note, *Broadcasting Offensive Programming Under a New Communications Act*, 15 COLUM. J.L. & SOC. PROBS. 427 (1980); Note, *FCC Empowered to Regulate Radio Broadcasts That Are Indecent But Not Obscene*, 52 TEMPLE L. Q. 170 (1979); Note, *Regulating Indecent Speech: A New Attack on the First Amendment*, 41 U. PITT. L. REV. 321 (1979) [hereinafter cited as *Regulating Indecent Speech*].

52. *See* Miller v. California, 413 U.S. 15 (1973). A work "which depicts or describes . . . sexual conduct" is obscene and may be banned if [1] "taken as a whole, [it appeals] to the prurient interest," . . . [2] portrays sexual conduct "in a patently offensive way," and . . . [3] taken as a whole, "lacks serious literary, artistic, political or scientific value." *Id.* at 24. *See* Krattenmaker & Esterlow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606, 607 n.2 (1983). Indecency regulations are aimed at sexually explicit programming which may be patently offensive to the community but which does not fully meet the strict *Miller* test for obscenity and, thus, may not be banned under the *Miller* doctrine. One alternative to the "indecency" approach to regulating sexually explicit and vulgar material on cable television might be to adopt a "variable obscenity" standard; e.g., establish that the standard for obscenity depends upon the medium of communication used, and thus, allow certain material to be declared "obscene" if transmitted via cable or broadcast television while the same material might not be obscene if presented in adult movie theaters, on video cassettes, etc.

53. 438 U.S. 726 (1978).

54. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. at 748-50; Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia*, 453 U.S. at 501. "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Id.* at 501 n.8., (quoting Southwestern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975)).

55. "Last year [1983] some three dozen First Amendment cases were brought by cable operators, a surprising handful of which seem to be headed for the Supreme Court. 'There's going to be a veritable explosion of litigation,' says Robert Roper, an attorney with the N[ational] C[able] T[elevision] A[ssociation]. 'It's happening right now.' " Gladstone, *Taking the First*, CableVision, May 7, 1984, at 36. *See* Weinstein, *supra* note 20, at 28-32.

country both reflects and engenders deep concerns on the part of the cable television industry,[56] government officials,[57] public interest groups concerned with mass media programming,[58] parents, and other private citizens.[59] The courts and legal commentators have finally begun to wrestle with this question in earnest.

A. *The Supreme Court's* Pacifica *Decision*

While the Supreme Court has yet to consider the regulation of indecent cable television programming,[60] it has considered the constitutionality of government regulation of nonobscene but indecent radio programming. In *FCC v. Pacifica Foundation*[61] the Supreme Court upheld a declaratory order of the FCC which reprimanded the owner of a radio station that broadcasted a nonobscene but "patently offensive" adult comedy monologue one afternoon in October, 1973.[62]

The Supreme Court framed the issue as "whether the First Amend-

56. *See National Cable Television Association, Inc., Memorandum to the Industry on Cable System Carriage of Adult Programming* (March, 1982); Gladstone, *supra* note 55, at 40; Gunther, *supra* note 21, at 7-10.

57. *See supra* notes 32-45 and accompanying text.

58. *See generally Cableporn—The Battle Is Joined,* The National Decency Reporter (Jul./Aug., 1982); *Libertarians Release Cable Study,* CableVision, Mar. 26, 1984, at 45; Ross, *supra* note 23, at 30.

59. *See generally* Deseret News, Mar. 13, 1983, at B1, col. 1 (concern of a private citizens group); Wall St. J., Sept. 23, 1982, at 37, col. 3 (concern of private citizens).

60. The Supreme Court almost considered the propriety of cable television indecency regulations in 1979 when it decided FCC v. Midwest Video Corp., 440 U.S. 689 (1979). That case began when a cablecaster filed suit in 1976 in the United States Court of Appeals for the Eighth Circuit to enjoin enforcement of a series of cable television "access rules," promulgated earlier that year by the FCC. One provision of the access rules required cablecasters to promulgate rules censoring indecent programming on access channels.

The Eighth Circuit held that the FCC had exceeded its jurisdiction in promulgating the rules. Midwest Video Corp. v. F.C.C., 571 F.2d 1025, 1035-45 (8th Cir. 1978), *aff'd,* 440 U.S. 689 (1979). Although the Eighth Circuit also suggested that the censorship provision violated the first amendment, the Supreme Court did not consider that question because the FCC had, in the meantime, withdrawn that particular provision and it was not "in controversy" before the Court. 440 U.S. at 693-94 n.4. Following the Supreme Court's decision, the Commission not only repealed the "indecency censorship" provision but declared that the only other regulation proscribing the transmission of indecent or obscene material over cable television would thereafter be applied "only to programming which is subject to system operator editorial control." In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 83 FCC 2d 147, 148 (1980). Later, the FCC rejected a request by the ACLU that it repeal its remaining indecency regulation. In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 87 FCC 2d 40 (1981). *See infra* note 70.

61. 438 U.S. 726 (1978).

62. The FCC had received a complaint from a man who had tuned in to the broadcast while driving in his car with his young son. *Id.* at 730. After investigation, the FCC did not impose formal sanctions, but put the declaratory order into the station's license file to be considered in the event that further complaints were received. The FCC did, however, clarify its definition of "indecent" and prohibited such programs from being broadcast. *Id.* The station appealed to the District of Columbia Circuit which overturned the FCC order. Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977). The Supreme Court granted the Commission's petition for writ of certiorari, 434 U.S. 1008 (1978), and reversed the judgment of the court of appeals. Mr. Justice Stevens authored the majority opinion as well as additional comments in which only a plurality joined.

ment denies government any power to restrict the public broadcast of indecent language in any circumstances."[63] A majority of the Court concluded that it did not and upheld the FCC's action as a reasonable restriction of the time, place and manner of broadcasting indecent material. The opinion of the Court, authored by Justice Stevens,[64] noted that the medium through which the message is communicated is important for first amendment analysis, and that broadcasting "has received the most limited First Amendment protection" for two reasons: because of its "pervasive presence in the lives of all Americans"[65] and because "broadcasting is uniquely accessible to children."[66] The time of broadcast, public access to the medium, content of program, audience, and legal sanction were all identified as critical factors which supported the conclusion that the FCC action did not violate the first amendment.[67] The Court concluded with a picturesque, constitutional simile:

As Mr. Justice Sutherland wrote, a "nuisance may be merely a

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63. 438 U.S. at 744. In interpreting the term "indecent" used in 18 U.S.C. § 1464 (1976) (making it a felony to utter "any obscene, indecent or profane language by means of radio communication"), the Supreme Court was satisfied with the colloquial definition, i.e., "nonconformance with accepted standards of morality." 438 U.S. at 740-41. For a review of other cases in which the term "indecent" used in section 1464 has been interpreted see Comment, *Obscenity, Cable Television and the First Amendment: Will FCC Regulations Impair the Marketplace of Ideas?*, 21 DUQ. L. REV. 965, 979-85 (1983).

64. One part of Justice Stevens' opinion, joined only by a plurality, argued that regulation of some *content* is constitutionally permissible as a general proposition. 438 U.S. at 744-45.

65. As Justice Stevens explained:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the first amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for battery is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 748-49 (citation omitted).

66.

> Second, broadcasting is uniquely accessible to children, even those too young to read . . . . Other forms of offensive expression may be withheld from the young without restricting the expression at its source . . . . We held in Ginsberg v. New York, 390 U.S. 629, that the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justifies (*sic*) special treatment of indecent broadcasting.

Id. at 749-750 (citation omitted).

67. Justice Stevens emphasized:

> This case does *not* involve *a two-way radio* conversation between a cab driver and a dispatcher, or a telecast of an *Elizabethan comedy*. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a *criminal* prosecution. The commission's decision rested entirely on *a nuisance* rationale under which *context is all-important*. The concept requires consideration of a host of variables. The *time of day* was emphasized by the commission. The content of the *program* in which the language is used will also affect the composition of *the audience*, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Id. at 750 (emphasis added).

> right thing in a wrong place,—like a pig in the parlor instead of the barnyard." *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926). We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.[68]

Justices Powell and Blackmun concurred in the judgment and in most of Justice Stevens's opinion, but they filed a concurring opinion to emphasize that regulations channeling indecent programming to protect children and the home are constitutional.[69]

Pacifica is the key to the constitutional question of whether any regulation of nonobscene but indecent sexual programming on cable television is constitutionally permissible. The issue turns on whether the *Pacifica* principle, which justifies regulation of indecent radio broadcasting, extends to indecent cable television programming.

B. *The Decisions of the Lower Federal Courts*

To date the constitutionality of regulations prohibiting or restricting the transmission of nonobscene but indecent sexually explicit material over cable television has been addressed in four cases decided by federal district courts and courts of appeals.[70] Thus far, no court has

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68. *Id.* at 750-51.

69. Justice Powell emphasized:

> The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it . . . .
>
> A second difference, not without relevance, is that broadcasting — unlike most other forms of communication — comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds . . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home.

Id. at 757, 759 (Powell, J. concurring).

70. The constitutionality of laws regulating indecent cable television programming was peripherally discussed in another case decided in 1977. In Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1977), *aff'd*, 440 U.S. 689 (1979), the Eighth Circuit held that the FCC had exceeded its statutory jurisdiction in promulgating "access regulations" for cable television, including a requirement that cable operators adopt rules prohibiting the transmission of obscene or indecent material on access channels. *See* 47 C.F.R. §§ 76.252-.256 (1977). The court held that the regulations were not "reasonably ancillary" to the Commission's statutory duty to oversee broadcast television. 571 F.2d at 1037-39. Resting its decision on the Commission's lack of jurisdiction to enact the regulations, the Eighth Circuit also suggested, without holding, that the censorship provisions were defective on first amendment grounds. The court noted that the mandatory access requirements appeared to violate the cablecasters' freedom of speech and suggested that the indecency censorship provision constituted an unlawful prior restraint. The court emphasized the practical difficulties of monitoring content under an open-access system such as that mandated by the FCC, it criticized the absence of procedural safeguards respecting prior restraints and noted the serious difficulties cablecasters would face in trying to define "obscene" and "indecent." Finally, the court noted the practical impossibility of cablecasters' implementing the Commission's suggestion that "distasteful" programs be transmitted at hours that would "minimize exposure to young children" in so far as cablecasters would have no control over the scheduling of programs on the access channels. *Id.* at 1055-58. The court, however, did *not* suggest that it was unconstitutional *per se* to regulate the transmission of indecent material over cable television. Rather, the court saw first

upheld any cable television indecency regulation.

1. *H.B.O*

The first reported case to rule on the constitutionality of indecency regulations applicable to cable television was *Home Box Office, Inc. v. Wilkinson*,[71] decided by the United States District Court for the District of Utah in January of 1982. That case involved a challenge to the constitutionality of a Utah statute making it a crime for any person to "knowingly distribute by wire or cable any pornographic or indecent material to its subscribers."[72] The plaintiffs' attack was limited to the state's attempt to ban nonobscene, but "indecent" cable television programming. The validity of the proscription against the transmission of "pornographic" material was not challenged.[73]

After a brief review of the history of the regulation of pornographic material, the court concluded that *Miller v. California*[74] defined the boundaries of permissible state regulation of sexual material. "States may *not* go beyond *Miller* in prescribing criminal penalties for distribution of sexually oriented materials. For better or worse, *Miller* establishes the analytical boundary of permissible state involvement in the decision by HBO and others to offer, and the decision by subscribers to receive particular cable TV programming . . . ."[75] The Utah legislation was constitutionally defective because it sought "to deal with subject matter beyond hard-core pornography [banning distribution of sexually explicit material that was only indecent but not obscene]—to go beyond Miller—and to do so without any of the safeguards mandated by *Miller*."[76]

The district court rejected the argument that the state's interest in protecting children justified the legislation. The court distinguished the

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amendment problems in the means employed, not in the objective pursued. The FCC did not appeal this aspect of the judgment. *See supra* note 60.

71. 531 F. Supp. 987 (D. Utah 1982).

72. UTAH CODE ANN. § 76-10-1229(1) (Supp. 1981).

73. The term "indecent material" was defined by a reference to the following:

(1) Illicit sex or sexual immorality is defined as:
  (a) Human genitals in a state of sexual stimulation or arousal;
  (b) Acts of human masturbation; sexual intercourse, or sodomy; or
  (c) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.
(2) Nude or partially denuded figure means:
  (a) Less than completely and opaquely covered:
    (i) Human genitals
    (ii) Pubic regions;
    (iii) Buttock; and
    (iv) Female breast below a point immediately above the top of the areola;
  (b) Human male genitals in a discernably turgid state, even if completely and opaquely covered.

531 F. Supp. at 995-96 n.16; *see also* UTAH CODE ANN. § 76-10-1227 and § 76-10-1229(4) (Supp. 1981).

74. 413 U.S. 15 (1973). *See supra* note 52.

75. 531 F. Supp. at 994-95 (emphasis in original).

76. *Id.* at 995.

Supreme Court's pre-*Miller* decision, *Ginsberg v. New York*,[77] which upheld a New York law prohibiting the distribution of nonobscene "girlie" magazines to minors. Judge Jenkins believed that *Ginsberg* had to be modified in light of *Miller*.[78] He further noted that, even if *Ginsberg* justified some regulation of material provided to children, the Utah legislation would still be defective, because "by its terms it would be equally applicable to cable TV programming reaching homes and environments having no children at all."[79] Finally, the district court emphasized the ease with which television viewers, especially cable television viewers, could shield themselves from offensive programming by not buying a television set, not subscribing to cable, or simply turning off the television.[80] The district court's judgment was not appealed.

2. *Roy City*

A few months later, the same federal district court was involved in assessing the constitutionality of another attempted regulation of cable television indecency. *Community Television of Utah, Inc. v. Roy City*,[81] involved a challenge to a municipal ordinance enacted by a small residential community in Utah. The cable television company had previously obtained a license from the city to use its easements, streets and ways to lay its cables. The new ordinance provided for the revocation of licenses, franchise agreements, and permits on a finding that the holder "[k]nowingly distributes any pornographic or indecent material as defined by law and in violation of the community standards of the community encompassed within the territorial area included within the Roy City boundaries . . . ."[82] Roy City conceded that its authority to regulate

77. 390 U.S. 629 (1968).

78. 531 F. Supp. at 994-96.

79. *Id.* at 997. The court described its standard of constitutional review as follows: "Looking at the statute as enacted, we ask the question: is this something that goes beyond *Miller* and enters an area that the Supreme Court appears to have said is an impermissible area to enter . . . ?" *Id.* at 999.

80. According to Judge Jenkins:

> At least under some definitions, a high percentage of what we see on television, I think, could very well be brought under the umbrella of indecency . . . . We put up with it. What we do if we have occasion to be offended by something in a program is we get up and turn it off. We do something else . . . . That's one of the nice things about TV—not just cable TV . . . . There is no law that says you have to watch. There is no law that says you have to purchase a television set. There is no law that says you have to subscribe to a cable TV service . . . . Cable television's peculiar advantages derive directly from this matter of choice. The consumer is offered potentially limitless access to programming sources and content . . . .

Id. at 1001-02.

81. 555 F. Supp. 1164 (D. Utah 1982).

82. Roy City, Utah, Ordinance § 17-3-2(5), (*quoted in* 555 F.Supp. at 1174 (Appendix A)). The term "indecent material" was defined to mean:

> material which is a representation or verbal description of:
>
> (a) An erotic human sexual or excretory organ or function; or
>
> (b) Erotic nudity; or
>
> (c) Erotic ultimate sexual acts, normal or perverted, actual or simulated; or
>
> (d) Erotic masturbation; which under contemporary community standards is patently offensive.

Roy City, Utah, Ordinance § 17-3-6 (*quoted in* 555 F.Supp. at 1176 (Appendix A)).

indecent transmissions over cable television was subject to constitutional limits.[83] The questions, therefore, were: what are those limits and what are the standards by which the constitutionality of such regulations should be evaluated? Roy City asserted that its ordinance should be assessed under the standards set forth by the Supreme Court in *Pacifica*. Community Television argued that *Pacifica* was inapplicable to cable television, and the district court agreed.[84] The court declared: "*Pacifica*, which deals with broadcasting, the transmission of electromagnetic radio waves through the publicly controlled airways, *is not applicable in this case. It is irrelevant.*"[85]

The court arrived at this conclusion after analyzing and weighing five criteria. The court first listed and contrasted some of the operating characteristics of cable television and broadcast television, emphasizing that the characteristics of each are dissimilar in several respects.[86]

For the second criterion, the district court gave a very narrow, technical definition to the concept of "pervasiveness," which was a key element in the *Pacifica* ruling. The court stated: "The city as well misapprehends the concept of pervasiveness. Literally it means everpresent. It is in the air, or diffused widely. In that sense, broadcasting meets the definition. In that sense it is pervasive because its medium, the air, is pervasive. Transmission by wire is not."[87]

Third, the district court asserted that the fact that cable television transmissions go directly into the home is irrelevant to the constitutional analysis.[88] Fourth, the court asserted that cable television is distinguish-

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83. 555 F. Supp. at 1165.

84. 555 F. Supp. at 1166, 1167.

85. *Id.* at 1169 (emphasis added).

86.

	Cable	*Broadcast*
1.	*User needs to subscribe.*	*User need not subscribe.*
2.	*User holds power to cancel subscriptions.*	*User holds no power to cancel. May complain to F.C.C., station, network, or sponsor.*
3.	*Limited advertising.*	*Extensive advertising.*
4.	*Transmittal through wires.*	*Transmittal through public airwaves.*
5.	*User receives signal on private cable.*	*User appropriates signal from the public airwaves.*
6.	*User pays a fee.*	*User does not pay a fee.*
7.	*User receives preview of coming attractions.*	*User receives daily and weekly listing in public press or commercial guides.*
8.	*Distributor or distributee may add services and expanded spectrum of signals or channels and choices.*	*Neither distributor nor distributee may add services or signals or choices.*
9.	*Wires are privately owned.*	*Airwaves are not privately owned but are publicly controlled.*

Id. at 1167. *See also infra* note 157 and accompanying text.

87. *Id.* at 1169.

88.

> The Court finds great difficulty in distinguishing (other than the popcorn) between going to the movies at a theater and having the movies come to me in my home through electronic transmission over wire. The choice is mine. The location is different. The content is the same. Why should the non-"indecent" on Main Street be transmuted by ordinance and municipal definition into "indecency" in my home? That does not make sense if we are talking about a standard to be applied uniformly. There is no distinction made with the *Miller* standard as

able from broadcast television because, with cable, "the spectrum of choice is appreciably expanded."[89] In enumerating the various choices available for cable television viewers, the court noted the initial election to subscribe to cable service; the ancillary selection of the scope of cable services proffered and accepted; movie channels which require an increased number of channels; and the ultimate choice of cable subscription cancellation.[90] The court considered the surfeit of choices as a primary reason for cable service subscription, contrasting the relative dearth of choices available for broadcast television viewers.[91]

The district court noted a final difference between cable and broadcast vis-a-vis acting in "the public interest." The court found that due to the limited number of broadcasters and their attendant favored economic opportunity in their use of the limited public resource of controlled airways, "broadcasters must act in the public interest."[92] The court determined that "[t]here is no such public interest charge to a cable distributor" in the regulation of cable television systems.[93]

Satisfied that the *Pacifica* standard did not apply to cable television, the district court held that the *Miller* obscenity standard was applicable to the constitutionality of cable television indecency regulations.[94] The district court emphasized that it was beyond the power of the city or state "to control communication that is *on the protected side of the pornographic line set forth in Miller.*"[95] Applying the *Miller* test, the court struck down as unconstitutional those provisions of the Roy City ordinance which regulated the transmission through cable television of material defined as indecent because it inhibited protected communication.[96]

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to whether one goes to the movies or prefers to have the movies come into one's home.

Id. at 1170. *But see infra* notes 202-220 and accompanying text.

89. *Id.* at 1168.

90. *Id.*

91. *Id. But see infra* note 145 and accompanying text.

92. *Id.* at 1169.

93. *Id. But see infra* notes 176-201 and accompanying text.

94. The three-pronged *Miller* standard "is a national standard with a core of uniformity which allows for a degree of flexibility at a community level." *Id.* at 1169. The *Miller* Court found that:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 1169 n.23, (quoting Miller v. California, 438 U.S. at 24).

95. *Id.* at 1171 (emphasis added). The court stressed:

> Beyond the line drawn in *Miller* public bodies must not step — indeed, cannot step — in the control of artistic communication content. This isn't just what this judge thinks . . . . In short, neither in the guise of licensing or franchising, nor in the guise of authorizing the use of public property by a private business distributing electronic signals, can a municipality control message content that is not pornographic.

Id. at 1172.

96. Roy City appealed the ruling of the district court in Community Television of Utah, Inc. v. Roy City, but dismissed its appeal after the Utah legislature enacted another law of state-wide application regulating the transmission over cable television of indecent

3. *Cruz (I)* and *Cruz (II)*

In August of 1983, a third federal court opinion on cable indecency regulations was handed down in *Cruz v. Ferre*.[97] In January of 1983, the city of Miami enacted a cable indecency ordinance which provided for the regulation of indecent and obscene material on cable television.[98] A month after the ordinance was enacted, a cable television service subscriber filed suit in federal court challenging the constitutionality of the city ordinance.[99]

The issue before the federal district court was whether the city could constitutionally regulate the dissemination through cable television of material defined by the city as "indecent."[100] The district court concluded that the city had exceeded constitutional limits by adopting regulations and enforcement methods which violated the first and fourteenth amendments.[101] Moreover, the court permanently enjoined the city from enforcing those sections of the ordinance which prohibited the transmission of indecent material on cable television.[102]

The court began its first amendment analysis[103] by noting that *Miller* carefully defines the limits of "permissible obscenity regulation."[104] The court stated that indecent speech or material falls outside the definitional boundaries of obscenity and is thus accorded protection by the first amendment against state regulation.[105] Finding that Miami's ordinance prohibited the cable transmission of both obscene and non-obscene, indecent materials, the court concluded that "in regulating the distribution of 'indecent' materials, the ordinance [swept] within its bounds 'speech' subject to constitutional protection,"[106] and thus was "overly broad and facially defective."[107]

The court acknowledged that in *Pacifica* the Supreme Court had

material. Roy City v. Community Television of Utah, Inc., 555 F. Supp. 1164 (D. Utah 1982), *appeal docketed*, No. 83-1217 (10th Cir. Feb. 17, 1983), *appeal dismissed*, No. 83-1217 (10th Cir. June 2, 1983). Additionally, the subsequently enacted state indecency statute is currently being challenged in federal court. *See infra* note 119 and accompanying text.

97. 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985).

98. *Id.* at 127. City of Miami, Fla. Ordinance No. 9583 (Jan. 13, 1983) states, in pertinent part, that if probable cause were found to exist, that the City Manager could impose sanctions if violations were determined to have occurred. *Id.*

99. 571 F. Supp. at 128. Home Box Office, Inc. intervened as a plaintiff; Cablevision, the local cablecaster; intervened as a defendant. *Id.*

100. *Id.* at 126.

101. *Id.*

102. *Id.* at 127. The city was also permanently enjoined from implementing the procedural section by which the ordinance was to be enforced. *Id.*

103. The court also found the ordinance to violate the fourteenth amendment's procedural due process and equal protection guarantees. Procedurally, the ordinance was deemed defective because it "concentrat[ed] the functions of complainant, jury, judge and 'executioner' in one person . . . ." *Id.* at 133. The court also summarily concluded that the equal protection clause was violated because the ordinance applied "only to cable transmissions" and not "to other forms of transmission such as over-the-air microwave transmissions, subscription broadcast television, or movie theaters." *Id.* at 134.

104. *Id.* at 130.

105. *Id.*

106. *Id.*

107. *Id.* at 130-31.

"found that even though indecent speech was afforded some constitutional protection, its content could be regulated under some circumstances,"[108] but proceeded to distinguish *Pacifica* on two grounds:

> [1] The ordinance . . . prohibits far too broadly the transmission of indecent materials through cable television. *The ordinance's prohibition is wholesale, without regard to the time of day or other variables* indispensable to the decision in *Pacifica*. [2] The rationale of *Pacifica applies only to broadcasting*. The medium of cable television presents different first amendment concerns; therefore, *Pacifica* is inapposite.[109]

The "greater overall viewing control" in cable systems, resulting from the availability of viewer guides and lockboxes, was deemed to be distinctively important.[110]

The city of Miami appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court two years later in *Cruz v. Ferre (II)*.[111] The first question the Eleventh Circuit had to decide was whether the ordinance should be reviewed under the flexible *Pacifica* indecency standard or under a strict *Miller* standard.[112] The Court of Appeals concluded that *Pacifica* was not applicable to the particular facts of the case.[113] Emphasizing that cable viewers must first elect to subscribe to cable and then pay an extra fee for additional programming services, the court distinguished the "pervasiveness" of cable programming from that of radio programming.[114] The court noted also that the accessibility of indecent programming to children[115] is significantly less in the case of cable than in the case of radio programming for several reasons: parents can decline to subscribe to cable, can decline to pay for extra services, can use program guides to control the programs their children view, and can obtain a lockbox or parental key.[116] Additionally, the court determined that recent decisions of the Supreme

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108. *Id.* at 131.

109. *Id.* (emphasis added).

110. The court emphasized that:

> [T]o protect children or other immature viewers from unsuitable program ming, subscribers [in Miami] need only use a free 'lockbox' or 'parental key' available from Cablevision. This opportunity to completely avoid the potential harm to minor or immature viewers sounds the death-knell of *Pacifica's* applicability in the cable television context.

Id. at 132.

111. 755 F.2d 1415 (11th Cir. 1985).

112. The Eleventh Circuit found that the enforcement sections of the Miami Ordinance violated the due process clause of the Constitution because the procedural protections were "not sufficient to protect the vital interests at stake." *Id.* at 1422.

113. *Id.* at 1420.

114. "The Court's concern with the pervasiveness of the broadcast media can best be seen in its description of broadcasted material as an 'intruder' into the privacy of the home. Cablevision, however, does not 'intrude' into the home." *Id.* at 1420. The court neutralized the "pig in the parlor" language from *Pacifica* by noting: "It seems to us, however, that if an individual voluntarily opens his door and allows a pig into his parlor, he is in less of a position to squeal." *Id.* at n.6.

115. The court found this to be "the more important justification" for *Pacifica*. *Id.* at 1420.

116. *Id.*

Court "have largely limited *Pacifica* to its facts."[117] The Eleventh Circuit also stated that even if it were to apply the *Pacifica* standard to the Miami ordinance it would affirm the district court because the total-ban ordinance was facially overbroad. The court found that the ordinance exceeded the regulatory bounds envisioned by the *Pacifica* Court in that it failed "to account for the variables identified in *Pacifica*: the time of day; the context of the program in which the material appears; the composition of the viewing audience."[118]

4. *Wilkinson (I)* and *Wilkinson (II)*

In *Community Television of Utah, Inc. v. Wilkinson*,[119] the federal district court in Utah decided its third case in three years involving a constitutional challenge or an attempt to restrict the transmission of sexually explicit material on cable television. The court granted a motion for summary judgment holding the Utah Cable Television Programming Decency Act[120] to be unconstitutionally overbroad and vague and there-

117. 755 F.2d. 1415, 1421 (11th Cir. 1985) (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983)).

118. *Id.* at 1422.

119. 611 F. Supp. 1099 (D. Utah 1985). The district court's holding was very narrow. The statute was challenged as facially overbroad. The court also discussed the federal preemption doctrine but concluded that the preemption question was tied to the first amendment question. *Id.* at 1101-1106. Judge Anderson concluded, very questionably, that evidence concerning the type of material actually transmitted, the ability of the cable company to prescreen material and delay showing it, and guidelines for implementingthe law, adopted by the Attorney General, were irrelevant. *Id.* at 1106 n.3, 1107.

120. UTAH CODE ANN. §§ 76-101-17-1 to -1708 (Supp. 1983). Before the Utah legislature convened in January, 1983, anti-pornography groups had circulated an Initiative Petition proposing the Cable T.V. Decency Act, which would have made it a misdeameanor "for any person to knowingly distribute within [Utah] any obscene or indecent material by means of cable television." Cable T.V. Decency Act (And Initiative Petition), Sept. 15, 1982 (copy in author's possesion). Under Utah law, a bill proposed by initiative petition must be considered by the legislature if five percent of the voters in the last election sign the petition. If the legislature does not enact the bill, it must be submitted to a popular vote during the next general election if the number of signitures the petition exceeds ten percent of the registered voters who voted in the last election. UTAH CODE ANN. §§ 20-11-1 to -4 (1984). The number of signatures on this petition exceeded ten percent of the voters who voted in the last election.

The Utah Attorney General, David Wilkenson, after consulting several lawyers concluded that the bill proposed in the petition would be unconstitutional (inasmuch as it did not significantly differ from the law that had been held unconstitutional two years earlier in *Roy City*). Thus, he assisted several legislators drafting an alternative bill, the Cable Television Programming Decency Act, in an attempt to respond to the concerns of the citizenry while avoiding the constitutional pitfalls which had nullified the earlier legislation. The resulting act eventually won the support of the backers of the petition and passed both houses of the legislature. The Governor vetoed the bill. Letter of Governor Scott M. Matheson to Lieutenant Governor David S. Monson (Mar. 30, 1983) (copy in author's possession). However, the state legislature overrode the veto and the Act became law without the governor's signiture.

Even though the legislature had enacted a substitute law regulating indecent cable, because the original petition had been signed by more than ten percent of the voters who voted in the previous election it was put on the November, 1984 ballot. With the combined opposition of persons who opposed any regulation of cable television and of supporters of the substitute Act which the legislature had passed, the Initiative Petition Proposal was defeated at the polls by a margin of nearly three-to-two. Deseret News, Nov. 7, 1984, at A-9 col. 1.

fore facially invalid.

Unlike prior laws which have been challenged the Utah Act merely regulated "the time, place, manner and context in which the material" was transmitted over cable television — it did not absolutely ban indecent cable programming. Moreover, the Act only applied to "a continuing course of conduct" rather than isolated incidents, and it imposed civil fines rather than criminal convictions.[121] Thus, the Act followed a relatively passive regulatory approach, rather than a heavy-handed outright ban[122] on sexually explicit cable television programming.

The court began its first amendment analysis of the Act by revising the *Miller* test for obscenity. It held that the Act was facially overbroad under *Miller* because the statute "[did] not limit itself to [regulating] material that is legally obscene."[123] The district court also held that the statute was not a valid time, place and manner regulation for two reasons. First, the court summarily declared that "indecency" is a content-based classification, and that constitutional time, place, or manner regulations cannot regulate on the basis of content.[124] Moreover, the Act was considered too vague "[b]ecause the meaning of the words 'time, place, manner, and context' is unclear; section -1702 does not provide the cable operators with notice of what material can or cannot be shown."[125]

Most of the district court opinion was devoted to rejecting the state's contention that the Act was constitutional under the *Pacifica* doctrine. The court held that *Pacifica* was factually distinguishable because the radio broadcast in *Pacifica* occurred in the mid-afternoon, while the Utah statute was not explicitly limited to afternoon cable program-

121. UTAH CODE ANN. § 76-10-1703 (Supp. 1983) provides that "[a] person shall be deemed to have maintained a nuisance when, *as a continuing course of conduct*, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming." (Emphasis added.) The term "indecent material" is defined as follows:

> a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human sexual or excretory organ or function, or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; of
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation which *the average person applying contemporary community standards for cable television* or pay-for-viewing television programming would find *is presented in a patently offensive way for the time, place, manner and context in which the material is presented.*

611 F. Supp. at 1100 (quoting UTAH CODE ANN. § 76-10-1702 (4) (1983 Supp.)) (emphasis added).

122. The district court paid little deference to the subtleties of the Act's language and described the Act as creating a "*de facto ban* of some cable material." 611 F. Supp. at 1111 (emphasis added).

123. *Id.* at 1108. The Act did not limit itself to regulating material that appeals to the "prurient interest" nor to material which, as a "taken whole, [l]acks serious literary, artistic, political, or scientific value." *Id.*

124. *Id.* at 1116.

125. *Id.* at 1117.

ming.[126] The court also noted that *Pacifica* involved a milder penalty.[127] Moreover, the district court observed that the United States Supreme Court vote in *Pacifica* "was closely divided."[128] The district court also inferred that *Pacifica* had been limited to its facts by the subsequent decision of the Supreme Court in *Bolger v. Youngs Drug Products Corp.*[129] In that case, the United States Supreme Court held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives was unconstitutional. The Utah federal district court interpreted the Supreme Court's refusal to apply *Pacifica* in *Bolger* to mean that *Pacifica* was limited to its facts.[130] The district court emphasized two "fundamental differences" between radio and television: unlike cable, radio has physical spectrum limitations and historically radio has been regulated while cable has not.[131] The court concluded that "[t]he differences between radio and television make *Pacifica* easily distinguishable . . . ."[132] Finally, the district court attempted to distinguish the rationale for *Pacifica*. The court rejected Utah's argument that cable television was more "pervasive" than the FM radio broadcast in *Pacifica*. The court noted that it is only "pervasiveness which *results* in an unwarranted intrusion upon one's right to be left alone" that justifies regulation of FM broadcasts.[133] The court concluded that "cable television is not an uninvited intruder."[134] Citing the *amicus* brief filed by the FCC, the district court noted four distinctions between cable television and FM radio: persons must subscribe to cable, they must pay an additional fee for movie channels, lockboxes are available, and viewer programming guides are available.[135]

The court also rejected the argument that the interest in protecting children justified the regulation of indecent cable programming because the Act failed to even mention children and, it failed "to provide any

126. "The Utah statute . . . imposes a fine upon cable operators who distribute material outlawed by the statute at *any* time." *Id.* at 1110. (emphasis in original). The Utah Attorney General promulgated guidelines providing that indecent cable programming could be transmitted during " 'adult viewing hours' (midnight to 7 a.m.)" without violating the "time, place, or manner" regulation. The district court disregarded those guidelines as no cure for the constitutional infirmity because they were not legally binding on subsequent attorneys general or on local municipal or county prosecutors, and thus protected speech might subsequently be threatened. *Id.* at 1110, 1114-15; *see also infra* notes 295-99 and accompanying text.

127. *Id.* at 1110.

128. *Id.* Here Judge Anderson made an arithmetic error. He noted that there were four dissenters and two concurring Justices. However, he overlooked the fact that the two concurring Justices joined in the rele vant parts of Justice Steven's opinion, which was denominated as the opinion of the Court representing the opinion of a majority, not just a plurality.

129. *Id.* at 1111 (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 650 (1983)).

130. *Wilkinson (I)*, 611 F. Supp. at 1111. The court also noted that the two arguments relied upon by Utah to defend the regulation of cable programming had been rejected by the Court in *Bolger* as adequate justification for the total prohibition of mailed advertisements. *Id.*

131. *Id.* at 1112-13.

132. *Id.* at 1115.

133. *Id.* at 1113 (emphasis in original). *Accord Pacifica*, 438 U.S. at 748.

134. *Wilkinson (I)*, 611 F. Supp at 1113.

135. *Id.*

systematic procedure for protecting children."[136] The court also noted that "the scope of the Utah law extends far beyond the interests of children."[137] Thus, the Utah act was held to be facially unconstitutional.[138]

The State of Utah appealed to the United States Court of Appeals for the Tenth Circuit. In *Wilkinson (II)*, a brief per curium opinion, the appellate court summarily affirmed the judgment of the district court "on the basis of the reasons stated in the [lower court's] opinion."[139] However, in a separate and lengthy, concurring opinion, Judge Baldock carefully analyzed the constitutional issues and repudiated the superficial analysis of the district court. First, he rejected the argument that nonobscene but sexually explicit material is constitutionally immune from any regulation because it is not obscene.[140] While the Utah indecency statute did not satisfy the *Miller* test because it did not require that a work as a whole appeal to prurient interests and lack serious social value,[141] precedent suggests "that the *Miller* adult obscenity standard is not the exclusive test to be applied to the regulation of sexually oriented material."[142] In addition, the *Miller* test, appears to be both ineffective and inapposite in the context of regulation of sexually explicit cable television programming.

Judge Baldock also explained that the district court had erred in holding that *Pacifica* does not apply to cable television. Whether indecent programming on cable television may be regulated depends largely upon how the medium of cable television is categorized. Although the Supreme Court has not yet decided how cable as a medium is to be characterized, the extent of regulation of cable television will most likely turn on a comparison of cable with other media, particularly broadcasting.[143] Broadcasting has received the most limited first amendment protection because of three characteristics: the physical scarcity of the airwave frequencies, the pervasiveness of the medium, and the ease of accessibility of children to the medium. Physical scarcity does not appear to be a limitation of the cable medium. However, cable and broadcast television are practically indistinguishable when it comes to pervasiveness and accessibility to children. In *Pacifica* the Supreme Court upheld the regulation of indecent broadcast programming pre-

136. *Id.* at 1114.

137. *Id.* at 1116 n.11.

138. Judge Anderson hinted that the law should be redrafted to provide specific guidelines concerning permissible times of indecent transmissions, emphasizing the importance of "fair notice or warning." *Id.* at 1117. But the Attorney General guidelines, which he ignored, already do that.

139. "The district court has written a comprehensive opinion with which we agree, and to which we can add little of value. We affirm its judgment on the basis of the reasons stated in the opinion." Jones v. Wilkinson, 800 F.2d 989, 91 (10th Cir. 1986) (per curiam). The rest of the opinion was devoted to another issue.

140. *Id.* at 996 (Baldock, J., concurring).

141. *Id.* at 997. However, he rejected the district court's conclusion that the Utah law also failed to meet the "patently offensive" requirement of *Miller*. *Id.* at 998.

142. *Id.* at 999.

143. The Tenth Circuit previously held that cable is very different from publishing, and some other appellate courts have reached the same conclusion. *Id.* at 1001.

cisely because of these two characteristics, and the rationale of *Pacifica* is equally applicable to cable television. Judge Baldock noted that the analytically significant characteristics of cable and broadcast television are very similiar: both rely on television receivers, both provide similar and often interchangeable products, in both cases transmissions emanate from outside the home and are received in the home, both are pervasive in our society, and in both cases other means of protecting viewers from the unwanted intrusion of offensive programming are ineffective.[144]

Judge Baldock specifically refuted the argument that government regulation of indecent cable television is unnecessary because viewers voluntarily subscribe to the medium. He stated that broadcast television viewers also voluntarily elect and pay to have access to that medium by purchasing a television set, yet the regulation of indecency on television is permitted. Like broadcast television programs, cable programs are disseminated to the public in general, not to specific purchasers such as those who purchase a particular movie or book. "The cable viewer is not purchasing a particular program at the time of viewing, rather he is purchasing a wider range of programs than is available on broadcast television."[145] There is no effective advance warning to viewers of offensive material on cable because viewers can tune in at any time. Programming guides are burdensome and ineffective, and "lockboxes" are ineffective because they involve "unwanted complexity" because they block out entire channels not just particular programs. The argument that cable television subscribers constructively consent to indecent cable programming "is too simplistic and is akin to the notion that one who hears an indecent broadcast has an adequate remedy by turning it off. This notion was expressly rejected in *FCC v. Pacifica* . . . ."[146] Cable television offers a valuable resource to families, and the opportunity to utilize that resource "should be available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours."[147]

Judge Baldock agreed that the Utah Cable Decency Act was unconstitutional because he thought it completely prohibited, rather that merely regulated, transmission of indecent cable television programs. Defining indecent cable programming by making statutory reference to "the time, place, manner and context" in which sexually explicit programming is presented was ambiguous because it would, "cause people of common intelligence to guess at the meaning of indecency and differ as to the law's application."[148]

Thus, to date no court has upheld any attempt to regulate nonobscene sexually explicit cable television programming. On rather broad grounds, the lower federal courts have declined to extend the *Pacifica*

144. *Id.* at 998-1005.
145. *Id.* at 1005.
146. *Id.* at 1006.
147. *Id.*
148. *Id.* at 1007. *But see infra* notes 295, 312-15 and accompanying text.

doctrine to cable television, rigidly insisting that *Miller* defines the only permissible regulation of sexually explicit cable programming.

C. *The Analytical Errors In The Lower Federal Court Opinions*

All federal courts which have attempted to restrict indecent cable television programming have consistently overstated the legal doctrines which they use to justify their judgments. Judge Baldock's concurring opinion in *Wilkinson (II)* contains the most careful first amendment analysis to date, yet the other two judges who decided that appeal ignored it and even Judge Baldock's analysis ultimately tripped on a misunderstanding of the statute involved. Surprisingly the lower courts' analytical overbreadth did not spoil the outcome in three of the cases which involved laws totally banning all indecent cable programming. Nevertheless, these analytical overgeneralizations could, and in the *Wilkinson* case clearly did, impair the analysis of and the judgment concerning more carefully-conceived and drafted measures designed to reasonably regulate, channel, and condition the transmission of sexually explicit indecent cable fare. The lower federal courts have committed two key analytical errors: they have suggested that sexually explicit material may only be regulated if it is obscene, and they have held that *Pacifica* has absolutely no application to cable television.

1. Some Limited Regulation of Nonobscene Sexually Explicit Material Is Permissible

The courts that have invalidated cable television indecency restrictions have held that governmental bodies may not constitutionally regulate the distribution of material "that is not pornographic."[149] This conclusion has been based upon the mistaken assumption that *Miller* defines the absolute "boundary" of permissible state regulation of sexually explicit cable television programming.[150] As both a factual and legal matter this generalization is overbroad and erroneous. The essential flaw is the simplistic reliance on a "pigeon-hole" analysis which insists that sexually explicit material either is obscene and can be regulated or not obscene and completely beyond regulation.

As a factual matter, sexually explicit material does not lend itself to such a bifurcation. Even the movie industry does not try to categorize films into just two categories. More important, however, as a matter of constitutional law the lower courts have erred in assuming that *Miller* defines the exclusive, absolute, universal boundary of permissible state regulation of all sexually explicit material.

The Supreme Court has in many cases upheld some reasonable re-

149. Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1172 (D. Utah 1982). The term "pornographic" means legally obscene under *Miller*.

150. *Wilkinson (I)*, 611 F. Supp. 1099, 1117 (D. Utah 1985); Cruz v. Ferre, 571 F. Supp. 125, 130 (S.D. Fla. 1983); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 989, 994-95 (D. Utah 1982); *Roy City*, 555 F. Supp. at 1169. *But see Wilkinson (II)*, 800 F.2d at 995-997 (Baldock, J., concurring).

strictions on nonpornographic sexual communication.[151] For example, in a case involving the regulation of nonobscene, sexually explicit "kiddie-porn," the Supreme Court noted that although some states may find that the *Miller* approach accommodates their interests, the first amendment does not prohibit states from going further. Specifically, the Court has said that *Miller* may fall short with respect to children. "The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."[152]

The *Miller* test was fashioned to assess the validity of laws which prevent individuals from obtaining sexually explicit material they desire to obtain, whereas cable indecency regulations are designed to protect other individuals from the intrusion of sexually explicit material they do not want to view. *Miller* is an effective test to protect legitimate constitutional interests in the former context, but it is inadequate and ineffective to protect the legitimate constitutional interests in the latter context. If protecting individuals and families from the intrusion of unwanted sexually explicit material is a constitutionally legitimate state interest — and there appears to be no doubt about that — *Miller* is the wrong test for it does not accomodate or allow states to effectively protect that constitutional interest.

2. The *Pacifica* Doctrine Is Not Limited to Radio Regulations

The most serious mistake made by the lower federal courts was declaring that *Pacifica* absolutely does not apply to cable television indecency regulations. Their rejection of *Pacifica* has been overbroad. In most of the lower court cases there was at least one compelling distinction between the case at bar and *Pacifica*: whereas *Pacifica* involved only the regulatory *channeling* of indecent programming, the laws involved in *HBO*, *Roy City*, *Cruz (I)* and *Cruz (II)* absolutely and totally *banned* sexually explicit material from the entire cable television medium. Only two courts, however, even mentioned this important distinction.[153] Generally, the lower courts have relied on potentially sweeping but surprisingly specious arguments to distinguish *Pacifica*. In *Wilkinson (I)*, the

151. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (kiddie-porn restrictions); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (restrictions on topless dancing in bars); FCC v. Pacifica, 439 U.S. 883 (1978) (indecent afternoon radio broadcasts); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (restricted zoning of "adult" theatres); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (statute authorizing Post Office to not deliver offensive mail to addressee at his request); Ginsberg v. New York, 390 U.S. 629 (1968) (prohibiting sale of "girlie magazines" to minors); *see also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm'n, 412 U.S. 94 (1973); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983).

152. New York v. Ferber, 458 U.S. at 761. *See also Wilkinson (II)*, 800 F.2d at 997-999 (Baldock, J., concurring).

153. This distinction was noted both in *Cruz (I)*, 571 F. Supp. at 131 and in *Cruz (II)*. 755 F.2d at 1421-1422. *See also Wilkinson (II)*, slip op. at 10-16 (Baldock, J., concurring).

court's reliance on overbroad generalizations to distinguish *Pacifica* caused the court to err.

Two lower courts have cited *Bolger* to suggest that the Supreme Court has "limit[ed] *Pacifica* to its facts."[154] This suggestion is simply erroneous. A quick review of citations to the case reveals that the Supreme Court has repeatedly relied on *Pacifica* even in deciding cases involving non-broadcast media.[155] In *Bolger*, the Supreme Court simply noted that *Pacifica* did not justify an absolute ban of all mailed contraceptive advertisements — a far cry from the conclusion that the *Pacifica* approach does not apply at all to regulations of indecent cable television programming. As Judge Baldock noted, *Bolger* is distinguishable because the *Bolger* Court "was satisfied that parents exercise substantial control over the distribution of mail [advertisements for contraceptives] received at home and that the restriction on this type of mail allowed parents to control and eliminate its receipt."[156]

The effort of the lower federal courts to distinguish *Pacifica* reached its nadir when Judge Jenkins created a "laundry list" contrasting some of the operating characteristics of cable and broadcast television.[157] The impressive-looking list, however, is analytically irrelevant because none of the characteristics described in it relate to the Supreme Court's analysis in *Pacifica*. The district court failed to mention, much less distinguish, the characteristics of the broadcast media which the Supreme Court identified as justifying a flexible standard of permissible regulation in *Pacifica*.

In *Pacifica* the Supreme Court acknowledged that there were three particularly important reasons why the first amendment does not prohibit reasonable time, place and manner restrictions on broadcasts that are indecent but not obscene: (1) because of the "pervasive presence" of broadcasting in the lives of Americans; (2) because radio programming confronts citizens in the privacy of their homes; and (3) because broadcast programming is "uniquely accessible to children."[158] From the perspective of these three key considerations there are no analytically significant differences between broadcast radio and cable television. With respect to pervasiveness, impact in homes, and accessibility to children, indecent cable television programming is analytically indis-

154. *Wilkinson (I)*, 611 F. Supp. at 1111; *see also Cruz (II)*, 755 F.2d at 1421-22.

155. *See, e.g.*, Bethel School Dist. No. 403 v. Fraser. 106 S. Ct. 3159, 3165-66 (1986); New York v. Ferber, 458 U.S. 747, 763 (1982) (kiddie-porn); Carey v. Brown, 447 U.S. 455, 471 (1980) (residential picketing); *see also* Board of Education v. Pico, 457 U.S. 853, 890 (1982) (Burger, C.J., dissenting) (school libraries); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985); Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982); Reeves v. McConn, 638 F.2d 762, 763 (5th Cir. 1981).

156. *Wilkinson (II)*, 800 F.2d at 1007 (Baldock, J., concurring).

157. Community Television of Utah, Inc. v. Roy City, 555 F. Supp 1164, 1167. *See supra* note 86. The appeal of the "laundry list analysis" is illustrated by the fact that it was copied and endorsed in the *Cruz (I)* opinion by Judge Hoeveler, whose independent analysis of *Pacifica* was otherwise impressively sound. *But see Wilkinson (II)*, 800 F.2d 1003-1006 (Baldock, J., concurring). *See supra* note 110 and accompanying text.

158. 438 U.S. at 748-49. *See supra note 65 and accompanying text.*

tinguishable from indecent broadcast programming.[159] While the *Pacifica* principle may require a different application to cable television than to radio, the absolute rejection of the *Pacifica* doctrine by the lower courts in cable television cases is analytically unjustifiable.

D. *The Law Review Commentators*

Legal commentators did not consider the constitutionality of the regulation of nonobscene but indecent cable programming until 1983.[160] Since then many articles or notes addressing this issue have been published.[161] The lower court decisions invalidating cable television indecency regulations generally have been applauded by the law review commentators.[162] *Pacifica*, on the other hand, has not been popular with the law review writers.[163] Most of the commentators seem to agree with the opinion of Professor Laurence Tribe that

> [t]he result the Court reached in *Pacifica* seems a poor basis for doctrinal extrapolation . . . . It would be regrettable, then, if the opinions of the majority were allowed to leave any enduring marks on First Amendment jurisprudence: *Pacifica* should be confined to its facts and eventually discarded as a "derelict in the stream of the law."[164]

The general reluctance of legal commentators to endorse the constitutionality of regulations restricting indecent cable television programming appears to be at least partially premised on the belief that it is dangerous for the state to interfere with the right of adults to have access to any communicative material they desire and that it is inappropriate for government to attempt to establish or preserve moral values pertaining to sexual behavior.[165] However, the commentators who have

159. *See infra* pp. 650-51, 656-59 and 661-663.

160. *See supra* note 51 and accompanying text.

161. *See, e.g.*, Geller & Lampert, *Cable, Content Regulation and the First Amendment*, 32 CATH. U. L. REV. 603 (1983); Hofbauer, *'Cableporn' and the First Amendment: Perspectives On Content Regulation of Cable Television*, 35 F.C.C.L.J. 139 (1983); Krattenmaker & Esterow, supra note 52; Riggs, *Indecency on Cable: Can It Be Regulated*, 26 ARIZ.L.REV. 269 (1984); Comment, *The Growing Pains of Cable Television*, 7 CAMPBELL L. REV. 175 (1984) [hereinafter cited as Comment, *Growing Pains*]; Note, *Indecent Programming on Cable Television and the First Amendment*, 51 GEO. WASH. L. REV. 254 (1983) [hereinafter cited as Note, *Indecent Programming*]; Comment, *Regulation of Indecent Television Programming*: HBO v. Wilkinson, 9 J. CONTEMP. L. 207 (1983) [hereinafter cited as Note, *Regulation of Indecent Television Programming*]. *See also* Note, supra note 63; *infra* note 332.

162. *See* Krattenmaker & Esterlow, *supra* note 52, at 608-11, 633; Note, *Indecent Programming, supra* note 161, at 263-68; *see also* Hofbauer, *supra* note 161, at 152-54, 176-81, 202-03; Note, *Regulation of Indecent Television Programming, supra* note 161, at 212-15; Comment, *Growing Pains, supra* note 161, at 188-92.

163. For example, Krattenmaker & Esterow, *supra* note 52, at 627 would treat *Pacifica* as "a limited exception, for an extreme, virtually non-replicable case." *See also* Geller & Lampert, *supra* note 161, at 615-16; Powe, *supra* note 51, at 895-905; *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 148-63 (1978); Note, *Regulating Indecent Speech*, *supra* note 51, at 332-41.

164. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 67-68 (Supp. 1979).

165. For instance, after arguing that *Pacifica* should be given the narrowest possible reading and that it should not be relied upon in assessing the constitutionality of laws prohibiting indecent cable television programming, the authors of one article opposed to indecency regulations concluded with this revealing caveat:

argued most vigorously against cable television indecency regulations have focused primarily on laws which totally prohibit such programming.[166] Their analyses have tended to be as overbroad as the prohibitions they have in mind. A few commentators have recently suggested that some regulations that partially prohibit or channel indecent programming on cable television should be constitutionally permissible under the principles of *Pacifica*.[167]

III. A Model Analysis of the Constitutionality of Regulations Restricting "Indecent" Sexually Explicit Cable Television Programming

It is well established that the first amendment protects nonobscene speech, even if it is patently offensive and indecent. It is equally clear that the first amendment does not forbid all regulation of protected speech. The question, therefore, is one of degree. And the degree of permissible state regulation of nonobscene but indecent, sexually explicit material depends upon a variety of factors which fall into two categories: the intrusiveness of the speech and the intrusiveness of the regulations.

Factors relating to the intrusiveness of the speech which are relevant to the analysis of cable television indecency regulations include: (1) the "pervasiveness" of the medium; (2) the monopolistic use of a public resource; (3) the privacy of the place into which the material intrudes; (4) the degree of audience captivity; (5) accessibility of inappropriate material to children; and (6) the offensiveness of the form of expression, especially if it is sexually explict. Factors relevant to assessing the intrusiveness of the regulation include: (1) the characteristics of the medium of communication; (2) the necessity for other regulation in the public interest; (3) the type of regulation imposed; and (4) the context of enforcement. Finally, the balance of harm to the competing interests must be assessed. All of these factors must be considered because "[t]he ability of government consonant with the Constitution to shut off discourse solely to protect others from hearing is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[168] These factors are considered below in the order

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> Consider the alternative. The danger of extending *Pacifica* to cable is self-evident. Such an extension would not only open the door to limit what is increasingly becoming an important additional means of disseminating diverse ideas and information, but also would threaten to destroy the first amendment rights of individuals to say, see and hear what they choose . . . . The state simply may not constitutionally regulate offensive material merely to protect its citizens' moral sensibilities, certainly not when the acquisition of that material requires an affirmative, informed choice by an adult.

Krattenmaker & Esterow, *supra* note 52, at 635-36.

166. *See, e.g., id.* at 606, 608, 624-25, 627-28; Note, *Indecent Programming*, *supra* note 161, at 263-68.

167. *See e.g.*, Riggs, *supra* note 161, at 326-28; Note, *Regulation of Indecent Television Programming*, *supra* note 161, at 214-15.

168. Cohen v. California, 403 U.S. 15, 21 (1971); *see also* Central Hudson Gas & Electric Co. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980).

listed.

A. *The Intrusiveness of the Speech*

1. The Pervasiveness of the Medium

The first justification given by the Supreme Court for allowing government regulation of indecent radio programming in *Pacifica* was the "uniquely pervasive presence [of radio broadcasting] in the lives of all Americans."[169] Unfortunately, the lower courts have thus far misunderstood the concept of "pervasiveness." For instance, in *Roy City*, District Judge Jenkins revealed his belief that "pervasiveness" merely referred to the physical attribute of airwave transmission.[170] It is clear, however, that the "pervasiveness" the Supreme Court was concerned with in *Pacifica* was the intrusive presence of broadcast programming in the daily lives of all Americans,[171] not the technical characteristics of the means of transmission.[172]

From several analytically significant perspectives the intrusive presence of cable television is greater and more pervasive than that of FM radio. The visual impact of television, both broadcast and cable, coupled with the auditory effect, gives television a greater impact than the mere words of radio. The Supreme Court in *Pacifica* explicitly tied the concept of pervasiveness to the presence of the medium in the home and to the difficulty of protecting the listener or viewer from unexpected program content.[173]

Although each of these factors will be discussed in depth below, it is important to note that from this protective or defensive point of view, the intrusiveness of a particular program on cable television is indistinguishable from broadcast radio or television programming. In each case the viewer has no control over channel programming. The viewer could avoid the offensive program by turning the channel, by turning off the set, or by avoiding the medium altogether.[174] Unlike purchasers of books, magazines or video cassettes who obtain only the specific material they desire, television viewers are confronted with programming selected for them by others and transmitted to them on a continuing basis. Cable television, like broadcast radio, reaches directly into the home where specific indecent programs may be an unwelcome intrusion for

169. 438 U.S. at 748.

170. Judge Jenkins wrote that pervasiveness "means ever-present. It is in the air, or diffused widely . . . . [Broadcasting] is pervasive because its medium, the air, is pervasive. [Cable] [t]ransmission by wire is not." 555 F. Supp. at 1169. *See also* Krattenmaker & Esterlow *supra* note 52, at 633.

171. 438 U.S. at 748.

172. For example, a "two-way radio conversation between a cab driver and a dispatcher" utilizes the same technology and medium — the public airwaves — as the commercial radio station involved in *Pacifica*; yet the Supreme Court implied that such broadcasting was not pervasive. *Id.* at 750.

173. 438 U.S. at 748-49 (Powell, J., concurring).

174. *Pacifica*, 438 U.S. at 748; *see also Wilkinson (II)*, 800 F.2d at 1006 (Baldock, J., concurring); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 128 (1973).

many adult subscribers who do not desire to view, even inadvertently, patently offensive sexual depictions, and where many children are in the viewing audience during most of the day and early evening.

Finally, in terms of economic and social impact, cable television is fast approaching the size and significance of broadcast television.[175] Cable television is now commonplace in virtually all communities. It is not unfair to conclude that the pervasive presence of cable television in the lives of Americans is as great or greater than that of FM radio in 1973 when the program complained of in *Pacifica* was broadcast.

2. The Monopolistic Use of a Public Resource

Greater media regulation is permitted when the medium regulated requires the use of public resources than when private resources are utilized. One reason broadcasting has been subject to greater regulation of sexually explicit material than the print media is because broadcasters use public resources and hold a public trust. A broadcaster enjoys the "advantages . . . of a preferred position conferred by the Government" and this justifies some "government[al] effort to assure that a broadcaster's programming . . . serve[s] the public interest."[176] Accordingly, under the first amendment a broadcaster enjoys "the widest journalistic freedom consistent with its public obligations . . . ."[177] Cable television also involves the use of the public domain — in some respects to an even greater degree than broadcast television.[178] Thus, cable television may be regulated in some ways print publishers and other nonusers of public resources are not.

The regulation of broadcast communications has been justified because of the conjunction of two unique characteristics of the medium: broadcasting requires the use of a public resource and the number of persons who can use that resource for that purpose is limited. Broadcasting requires the use of radio frequencies which belong to the public.[179] By the 1920's, it was apparent that radio frequencies could accommodate only a limited number of broadcasters and that the demand to broadcast over the radio exceeded the supply of available fre-

175. *See supra* notes 2-14 and accompanying text. In the small residential community of Roy City, Utah, apparently 78% of the eligible homes subscribed to the cable TV service offered by the plaintiff in the Roy City case. Appellant's Brief, at 6, Community Television of Utah, Inc. v. Roy City, No. 83-1217 (10th Cir., May 17, 1983). *See also Wilkinson (II)*, 800 F.2d at 1005 (Baldock, J., concurring).

176. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owner; the broadcast station cannot.

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

177. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. at 110 (emphasis added); *see also* Columbia Broadcasting Sys., Inc. v. FCC, 453 U.S. at 395.

178. *See generally* Kreiss, supra note 50, at 1024-26.

179. *See generally* FCC v. League of Women Voters, 468 U.S. 364, 377 (1984); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101-02 (1973).

quencies.[180] Thus, the reasonable regulation of broadcast communications, consistent with the legitimate public purposes to which the public airwaves have been dedicated, has been upheld,[181] even though similar regulation of media not requiring the use of limited public resources has been invalidated.[182] Likewise, reasonable regulation of other media which require the use of limited public resources has been upheld so long as the regulation has been consistent with the legitimate public purposes to which those public resources have been dedicated.[183]

Like broadcasting, cable television requires the use of public resources. Cable television companies must use public ways, alleys, streets, easements and public condemnation authority to run and maintain their cables.[184] Developing and maintaining a cable television system would be impossible without the right to enter, use, and possibly disrupt public property or public easements on private property. Moreover, the public resources necessary for the operation of cable television systems can only be used by a very limited number of cable television operations at one time.[185]

180. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 387-90; *see also* National Broadcasting Co. v. United States, 319 U.S. 190, 213-14, (1943). It is questionable whether the "scarcity" rationale still is a valid justification at all for broadcasting regulations. *See* Botein, *Cable TV in the U.S.A.: The Legal and Regulatory Environment*, 3 J. MEDIA L. & PRAC. 320, 323 (1982); Fowler & Brennan, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-26 (1982). *But see* FCC v. League of Women Voters, 468 U.S. 364, 376 n.11.

181. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. FCC, 453 U.S. 367 (1981) (federal statute requiring broadcasters to sell airtime to candidates for federal office upheld); *Pacifica*, 438 U.S. 726 (penalty for broadcasting indecent radio program upheld); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the "fairness doctrine" which requires broadcasters to give persons or causes criticized in editorials an opportunity to reply).

182. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (Florida statute requiring newspapers to give free right to reply to political candidates whom they had editorially criticized held unconstitutional by unanimous Court).

183. *See, e.g.*, *Perry Educ. Ass'n*, 460 U.S. 37 (school district policy permitting union representing teachers to use internal school mail system but denying other unions from using the system constitutional); Greer v. Spock, 424 U.S. 828 (1976) (upholding military regulations banning partisan political speeches and literature disruptive to military morale on military post); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city policy prohibiting use of advertising space on public buses for political advertising held to be constitutional even though the city allowed commercial advertising for public service groups, churches, banks, cigarettes, liquor, etc.). *Cf.* Carey v. Brown, 447 U.S. 455 (1980) (Illinois statute which prohibited residential picketing except in labor dispute invalidated); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (PSC ban on billing letter inserts discussing controversial issues invalidated); Police Dep't v. Mosley, 408 U.S. 92 (1972) (ordinance prohibiting picketing on a public way near school invalidated); Hague v. CIO, 307 U.S. 496 (1939) (ordinance prohibiting public meetings and distribution of printed material in streets without permit unconstitutional).

184. *See, e.g.*, Omega Satellite Prod. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

185. This is due in part to the intolerable disruption of the public ways created by the repeated trenching, stringing, and repairing of the public ways which multiple cable systems could foster. *See generally* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1449 (D.C. Cir. 1985); *Omega Satellite Prod. Co.*, 694 F.2d at 127; *Community Communications Co.*, 660 F.2d at 1397. *But cf.* Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396,

Because cable television systems require the monopolistic or oligopolistic use of certain public resources,[186] it is well within the province of a local government to dedicate those resources to purposes consistent with the character of the community and the quality of its neighborhoods. As a condition to the use of their public resources, it is reasonable for family-oriented communities to require a cable television company to agree to provide programming that is not unfit for general family viewing — at least during hours when families would be watching television. Such requirements would be consistent with the legitimate public purposes to which the public resources are dedicated: to protect

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1406 (9th Cir.), *cert, granted*, 106 S. Ct. 302 (1985), *aff'd and remanded* 106 S.Ct. 2043 (1985) ("It has not been alleged that public utility facilities owned or controlled by the City can only support the use of a single or a few cables.") The Supreme Court remanded *Preferred Communications* for "fuller development of the disputed issues" of fact, e.g. the degree of disruption and the dangers of having two cable operations. 106 S. Ct. at 2038. Another factor is that cable television systems operate in most communities as "natural monopolies." *Omega Satellite Prod. Co.*, 694 F.2d at 126. Judge Posner, writing for the Seventh Circuit, described the "natural monopoly" of cable television this way:

> The cost of the cable grid appears to be the biggest cost of a cable television system and to be largely invariant to the number of subscribers the system has. We said earlier that once the grid is in place — once every major street has a cable running above or below it that can be hooked up to the individual residences along the street — the cost of adding another subscriber probably is small.
>
> If so, the average cost of cable television would be minimized by having a single company in any given geographical area; for if there is more than one company and therefore more than one grid, the cost of each grid will be spread over a smaller number of subscribers, and the average cost per subscriber, and hence price, will be higher. If the foregoing accurately describes conditions . . . it describes what economists call a "natural monopoly," wherein the benefits, and indeed the very possiblity, of competition are limited. You can start with a competitive free-for-all — different cable television systems frantically building out their grids and signing up subscribers in an effort to bring down their average costs faster than their rivals — but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways, who must compete with the cable television companies for access to them.

Id. While the existence of a natural monopoly does not warrant regulation of private communications media, the fact that a public resource realistically may be used by only one, or a very few, cable system(s) at a time, necessarily and directly affects the public interest upon which the constitutionality of cable television regulations depends. *See, e.g., Omega Satellite Prod. Co.*, 694 F.2d at 127-28; *Community Communications Co.*, 660 F.2d at 1379. The validity of the restrictions imposed upon users of the medium must directly relate to the legitimate public purposes to which it has been dedicated.

186. The Tenth Circuit noted these points in an excellent opinion, Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), wherein the court distinguished cable television from the print media and held that cable broadcasting's attributes are sufficiently distinguishable from those of the print medium to preclude applying "the nearly absolute strictures against direct government regulation of newspapers' disemmination of information . . . in wholesale fashion to cable operators." *Id.* at 1377. In an incisive opinion for the court of appeals, Judge Seymour concluded that "government must have some authority in such a context to see to it that optimum use is made of the cable medium in public interest," *id.* at 1379, because of the "natural monopoly" aspect of cable television, *id.* at 1378, and because cable television systems must utilize public streets, ways, alleys and easements, causing "government and cable operators [to be] tied in a way that government and newspapers are not." *Id.* at 1377-78.

and foster the character of the community. Because the type of material restricted would still be available to the members of the community through private channels of communication,[187] the decision to so condition the use of the public resources could hardly be deemed censorship of private communications.

Nothing in the first amendment requires local governments to provide public resources as a conduit for transmission of material that offends the values and subverts the character of the community. Nothing in the first amendment prevents the government from requiring a communications company that enjoys the exclusive or oligopolistic use of the public domain for private profit to refrain from transmitting at certain times or under certain conditions sexually explicit material that is patently offensive to the community.[188] Dedication of public resources to foster an atmosphere in which families can enjoy access to educational programs, coverage of current events, and quality entertainment in their homes without having to risk the intrusion of unwanted sexually explicit programming is a legitimate and important public interest. Insofar as the regulations imposed upon cable operators reasonably further that interest in a manner which is not overly broad and without prejudice to particular viewpoints, the first amendment provides no basis for invalidating the regulations.

Board of Education v. Pico[189] provides strong support for this conclusion. The issue in that case was whether a local board of education could remove from junior high school and high school libraries certain books which it found to be "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[190] The trial court granted summary judgment for the school board, but the court of appeals reversed and remanded for trial. The Supreme Court affirmed, holding that there was a genuine issue of material fact.[191] Significantly, eight of the Justices specifically indicated that even though the books were not obscene they could constitutionally be removed if they were vulgar.[192] If a

187. For example, video rental outlets, bookstores, theatres, etc. Moreover, this material might also be available on cable television at times when it was not devoted to furthering the dedicated purposes.

188. *See Red Lion Broadcasting*, 395 U.S. at 389: "There is nothing in the First Amendment which prevents the Government from requiring a licensee . . . to conduct himself as proxy or fiduciary with obligations to present those views and voices which are representative of his community . . . ." *See also* Kreiss, *supra* note 50, at 1026. "The argument that the cable operator ought to have complete editorial freedom in order to disseminate his own views and ideas is considerably weakened when the cable operator is considered a conduit."

189. 457 U.S. 853 (1982) (plurality opinion).

190. *Id.* at 857.

191. *Id.* at 869-75 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ.); *id.* at 883-84 (White, J., concurring in the judgment only). Three Justices, in an opinion written by Justice Brennan, argued that the first amendment protects a "right to receive information" and that school libraries occupy a unique and specially-protected place in the constella tion of first amendment rights. *Id.* at 863-69 (Brennan, J., opinion joined by Marshall and Stevens, JJ., Blackmun, J., joined in part). Five Justices, however, explicity rejected that broad theory. *Id.* at 875-80 (Blackmun, J., concurring in part); *id.* at 885-95 (Burger, C.J., dissenting joined by Powell, Rehnquist and O'Connor, JJ.).

192. *Id.* at 871 (Brennan, J., joined by Marshall and Stevens, J.J.) ("pervasively vul-

school or public library may ban or restrict access to certain nonobscene books or magazines that some of its patrons want to read but which would offend many others and are deemed to be vulgar,[193] it is not unreasonable for state and local governments to similarly regulate programming on cable television systems which enjoy the privilege of exclusive use of public resources.

In *Southeastern Promotions, Ltd. v. Conrad*,[194] several members of the Supreme Court upheld the principle that public authorities may forbid the use of public resources for sexually explicit programs. The Court considered the refusal of a municipality to lease a city theater to Southeastern Promotions for presentation of the musical "Hair," which was replete with scenes involving group nudity and simulated sex. A jury, the trial court, and the court of appeals upheld the municipality's refusal, finding that the production was "obscene."[195] The Supreme Court did not review that finding, nor did the majority address the constitutionality of restricting use of public facilities for sexually explicit programs. Emphasizing the narrow basis for its decision, the Court found the municipality's refusal unconstitutional because the decision to refuse to lease was made "under a system lacking in constitutionally required minimum procedural safeguards."[196]

In separate opinions, however, three dissenting Justices addressed the lurking first amendment issue and explicitly endorsed the propriety of a public entity monitoring for decency the material presented on a publicly-owned stage. Justice White, who refrained from addressing the first amendment question in *Pico*, emphasized in a dissent which was joined by the Chief Justice that a public entity "may reserve its auditorium for productions suitable for exhibition to all citizens of the city, adults and children alike."[197] Justice Rehnquist declared:

> [I]f it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facilities, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think

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gar"); *id.* at 880 (Blackmun, J., concurring in part) ("offensive language" or inappropriate to age group); *id.* at 890 (Burger, C.J., dissenting, joined by Powell, Rehnquist and O'Connor, JJ.) ("random vulgarity" would be sufficient); *id.* at 897 (Powell, J., dissenting) ("vulgar or racist").

193. When school libraries are involved, the constitutional analysis is different than when the library involved is an ordinary public library. While there has been substantial litigation concerning censorship in school libraries, *see supra* note 191 and Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497 (1983), there has been surprisingly little litigation concerning censorship or restriction of materials in public libraries. *See, e.g.*, O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209 (1973); O'Neil, *Libraries, Librarians and First Amendment Freedom*, 4 HUMAN RTS. 295 (1975); Schmutz, *The Purity Patrol*, 10 STUD. LAW., Oct. 1981, at 14, 16; Appleson, *Lawscope: Out of Reach*, 67 A.B.A.J. 825 (1981).

194. 420 U.S. 546 (1975).

195. *Id.* at 550-52.

196. *Id.* at 552.

197. *Id.* at 569 (White, J., dissenting, joined by Burger, C.J.).

the policy can be described as arbitrary or unreasonable.[198]

Finally, the *Pacifica* opinion further supports the principle that public bodies may regulate vulgar programming on communications systems using limited public resources to operate. The significance of cable operators' use of public resources is emphasized by the Supreme Court's distinction in *Pacifica* of private, closed-circuit cable systems. The Court noted that "differences between radio, television, and *perhaps closed-circuit transmissions*, may also be relevant [to the constitutional analysis]."[199] Therefore, private "closed circuit" cable television systems operated on private property present an analytically distinguishable situation.[200] Public cable television systems, however, are not "closed circuit" in any sense that was relevant to the constitutional analysis in *Pacifica*. To impose reasonable restrictions on the transmission of sexually explicit material over public cable television systems, which must use the public domain to operate does not, however, constitute an intrusion on the constitutionally protected first amendment or privacy interests of cable operators or subscribers. Clearly, then, the public interests of decency and good taste justify *some* regulation of speech communicated via media using public resources.[201]

3. The Privacy of the Place into Which the Material Intrudes.

The place where the communication occurs is extremely significant for first amendment analysis. The Supreme Court has emphasized that the reasonableness of a time, place and manner regulation depends upon "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[202] The Court has repeatedly distinguished communication that occurs in public from communication that intrudes into the privacy of the home. The latter has consistently been subject to greater regulation under the first amendment than the former. As a place of refuge, the home has been accorded the status of a constitutionally protected sanctuary.[203] The Supreme Court has stated that "[t]he state's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[204] This special status derives from our constitutional traditions of extraordinary respect for personal privacy[205] and deference to family autonomy.[206] The value of protect-

198. *Id.* 572 (Rehnquist, J. dissenting).

199. 438 U.S. at 750 (emphasis added).

200. For example, closed-circuit cable systems operated by "x-rated motels" which show sexually explicit movies to thier customers might call for a different analysis. Those systems are analytically more similar to private "x-rated" movie theatres than to public cable television systems.

201. 438 U.S. at 760 (Powell, J., concurring). *See infra* note 309.

202. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

203. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969). *See generally* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing The Individual And Social Interests*, 81 MICH. L. REV.463 (1983).

204. Carey v. Brown, 447 U.S. 455, 471 (1980).

205. Payton v. New York, 445 U.S. 573 (1980) (warrantless and nonconsensual entry into defendant's home to make routine felony arrest unconstitutional); Stanley v Georgia,

ing the sancity of the home is so important that the Supreme Court has upheld statutes protecting the residential character of entire neighborhoods, not just individuals' residences, from unwanted intrusions of protected sexual activity.[207]

In *Rowan v. United States Post Office Department*,[208] the Court upheld the constitutionality of a federal statute requiring the mailer of material which the recipient considered to be "sexually provocative" to remove, upon request, the name and address of the recipient from the mailer's mailing list. The Court rejected the argument that the Constitution permits a vendor "to send unwanted material into the home of another" because "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost some of its vitality . . . ."[209]

This factor was emphasized in both the majority and concurring opinions in *Pacifica*. There the Court said: "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the first amendment rights of an intruder."[210] Concurring, Justice Powell, joined by Justice Blackmun, un-

394 U.S. 557 (1969) (overturning conviction of defendant for merely possessing obscenity in his home); Silverman v. United States, 365 U.S. 505 (1961) (insertion of "spike mike" into heating duct of defendant's home unconstitutional); Irvine v. California, 347 U.S. 128 (1954) (illegal entry to install microphone in bedroom of defendant "flagrantly . . . violate[d] the . . . Fourth Amendment," but exclusionary rule held not applicable to states); Rochin v. California, 342 U.S. 165 (1952) (forced stomach pumping to recover illegal drugs unconstitutional). In fact, the Court has repeatedly declared that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States Dist. Court, 407 U.S. 297, 313 (1972). "The fourth amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a home that finds its roots in clear and specific constitutional terms . . . ." *Payton*, 445 U.S. at 589; Griswold v. Connecticut, 381 U.S. 479 (1965) (conviction of family planning employee for violating law prohibiting distribution of contraceptives or contraceptive information overturned).

206. *See* Parham v. J.R., 442 U.S. 584 (1979) (law authorizing parents to commit their child to mental hospital over child's objection without adversarial hearing upheld); Moore v. City of East Cleveland, 431 U.S. 494, 499-506 (1977)(conviction of grandmother for violation of zoning statute prohibiting her from allowing two grandsons to reside with her overturned); Wisconsin v. Yoder, 406 U.S. 205 (1972)(conviction of Amish parents for not sending their children to school past the eighth grade overturned).

207. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (zoning ordinance requiring motion picture theaters that show non-obscene but sexually explicit movies to be dispersed throughout the city upheld). *Cf.* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (zoning ordinance prohibiting live entertainment was applied to prohibit nude dancing, held unconstitutional, with dicta stating that "if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities. . . ." *id.* at 76). In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), Justice Douglas, writing for the Court, declared: "The police power is not confined to eliminating filth, stench and unhealthy places. *It is ample to lay our zones where family values*, youth values, and the blessings of quiet seclusion and clean air *make the area a sanctuary for people*. *Id.* at 9 (emphasis added).

208. 397 U.S. 728 (1970).

209. *Id.* at 737, 738.

210. 438 U.S. at 748. Furthermore, the Supreme Court in *Pacifica* defended the restriction on indecent radio broadcasts because of the distinction that "adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." *Id.* at 750 n.28.

derscored the significance of this intrusion:

> [B]roadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds . . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound[s] does not mean we must be captives everywhere."[211]

In many cases where laws regulating speech in public have been invalidated on first amendment grounds, the Supreme Court has been careful to distinguish this factor and has reiterated that regulation in the interest of protecting the privacy of the home is permissible. For instance, in *Cohen v. California*,[212] the Supreme Court overturned the "disturbing the peace" conviction of a young man who wore a jacket in a public courthouse bearing the slogan "Fuck the Draft." The Court stated that the privacy interest of individuals who are offended by seeing a printed vulgarity while "walking through a courthouse corridor . . . is nothing like the interest in being free from unwanted expression in the confines of one's own home."[213] The Court has recognized that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue."[214]

Similarly, in *Erznoznik v. City of Jacksonville*,[215] the Court declared unconstitutional a local ordinance prohibiting drive-in movie theaters from showing any film that contained nudity. Again, however, the Court carefully distinguished the greater interest of the state in protecting the privacy of the home from the "limited privacy interest of persons on the public streets."[216] The Court observed that the kind of regulations enacted by the city of Jacksonville "have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."[217] In *Carey v. Brown*[218] the Court held that an Illinois statute prohibiting picketing at residences, except labor picketing, unconstitutionally violated the equal protection clause. The Court, however, emphasized that the defect in the statute was its unconstitutional preference for one type of speech,[219] and went to great lengths to reit-

211. *Id.* at 759 (quoting Rowan v. Post Office Dept., 397 U.S. 728 (1970) (Powell, J. concurring)).
212. 403 U.S. 15 (1971).
213. *Id.* at 21-22.
214. *Id.* at 21.
215. 422 U.S. 205 (1975).
216. *Id.* at 212.
217. *Id.* at 209 (citations omitted).
218. 447 U.S. 455 (1980).
219. *Id.* at 461-63.

erate that the protection of homes from unwanted speech was a valid objective of state legislation. "Preserving the sanctity of the home . . . is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.' "[220]

The nature and degree of intrusiveness into the home of cable programming is virtually identical to that of broadcast television. Indecent cable television programming reaches directly into the homes of all persons who subscribe to the medium, some of whom deeply resent the intrusion of sexually offensive materials into the havens they have created for their families. Protecting the sanctuary of the home justifies reasonable regulations which enable families to avoid unwanted intrusions of sexually explicit indecent material into their homes without foregoing an entire medium. As with broadcast television and radio, cable television should be reasonably regulated to achieve this goal.

4. Audience Captivity

Because the television viewer has no control over the television programming, he is, in a sense, a captive of the programmer whenever he turns on the television set. This is just as true of cable television as it is of broadcast television. This type of intrusiveness was emphasized by the Supreme Court in *Pacifica* as one of the main justifications for the constitutionality of the regulation of broadcast indecency.[221] Many viewers subscribe to cable for programs such as news, sports and general entertainment but do not want to see, even inadvertently, sexually explicit programs. Their invitation of the cable medium into their homes is no more an invitation of sexually explicit cable programming than was the purchase of FM radio an invitation to George Carlin's indecent monologue which was heard by the complainant and his son in *Pacifica*. The Supreme Court, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[222] upheld the FCC's finding that a television broadcaster had not violated the Fairness Doctrine by refusing to sell time to responsible entities to present views on public issues. The Court noted that "in a very real sense listeners and viewers constitute a 'captive audience.' "[223] Quoting Judge Bazelon, the Court observed: " 'Written messages are not communicated unless they are read, and reading requires an affirmative act . . . . [A]n ordinary habitual television

220. *Id.* at 471 (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring)). The Court further emphasized that " 'no mandate in our Constitution leaves States . . . powerless to pass laws to protect the public from . . . conduct that disturbs the tranquility of spots selected by the people . . . for homes . . . .' " *Id.* at 470-71.

221. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. Carey v. Brown, 438 U.S. at 748, 749. *See also id.* at 759 (Powell, J., concurring) (emphasizing that "a different order of values obtains in the home").

222. 412 U.S. 94 (1973).

223. *Id.* at 127.

watcher can avoid [messages] . . . only by frequently leaving the room, changing the channel, or doing some other such affirmative act.' "[224]

Even in cases not involving the home, the Court has justified state regulation designed to protect captive audiences from unwanted intrusions.[225] Most recently the Court emphasized this factor in *Bolger v. Youngs Drug Products Corp.*[226] Distinguishing the *Pacifica* statute prohibiting indecent radio broadcasting from the statute before it, which prohibited the mailing of unsolicited advertisements for contraceptives, the Court found mail to be "far less intrusive and uncontrollable" than radio or television broadcasts.[227] The Court opined that the "short, though regular, journey from mail box to trash can . . . is an acceptable burden" to impose upon persons who receive unsolicited contraceptive advertisements through the mail.[228]

The lower courts which have invalidated cable indecency regulations have emphasized the ostensibly greater freedom which cable television affords its viewers as compared to broadcast television.[229] The courts, however, have confused different methods of making the same choice with different choices. They have embraced the fallacy that one is freer, or has more choice, if four steps are required to tune-in than if the process only requires three steps.

There is no analytically significant distinction between the "entry choice" made by the viewer of broadcast television and the viewer of cable television. The entry choices are made in different ways[230] and involve different market costs,[231] but they are functionally equivalent.[232] The choice to subscribe to cable television service and receive a prepackaged set of cable channels is functionally no different than the purchase of a television set with channel capacity limited to the twelve ordinary frequency bands, or a television set with the capacity to receive six higher frequency channels, or a radio with AM and FM tuning. The choice to tune in to a program is the same, whether the viewer must manipulate three knobs or four. The choice to tune out or turn off a television program is the same whether the program is transmitted over cable or broadcast television.

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224. *Id.* at 128 (quoting Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)(emphasis in original)).

225. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Public Util. Comm'n v. Pollack, 343, U.S. 451 (1952); Kovaks v. Cooper, 336 U.S. 77 (1949).

226. 463 U.S. 60 (1983).

227. *Id.* at 74.

228. *Id.* at 72 (quoting Lamont v. Comm'n of Motor Vehicle, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2nd Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)).

229. *See, e.g., Cruz (I)*, 571 F. Supp. 125, 132; *Roy City*, 555 F. Supp. 1164, 1168-69. The courts have emphasized that cable viewers must voluntarily subscribe. *Cruz (II)*, 755 F.2d at 1419; *Wilkinson*, 611 F. Supp. at 1113; *Cruz (I)*, 571 F. Supp. at 132; *Roy City*, 555 F. Supp. at 1169-70; *H.B.O.*, 531 F. Supp. at 1001-02; *see also* G. SHAPIRO, P. Kurland & J. Mercurio, "Cable Speech" The Case for First Amendment Protection 42-48 (1983).

230. Different ways are: T.V. purchase versus purchase plus cable subscription.

231. For example, $25 per month on installment to buy the television set versus $35 per month—$25 for the television set plus $10 for the cable service.

232. From the *Pacifica* perspective, it is noteworthy that FM radio is an "extra" level of radio service, purchased as an "extra" *supra* notes 145-46 and accompanying text.

More important, once the cable television subscriber has made his entry decision, to buy the television and subscribe to cable, he is every bit as much a "captive" of the system's programming as the broadcast television viewer. A television network or cable system executive in New York or elsewhere chooses which programs to present and when to transmit them.[233] Unlike a book-buyer or movie-goer, the T.V. purchaser or cable subscriber has selected specific content. Thus, to a large extent, the viewer is at the mercy of cable television programmers.[234] Without some public regulation the individual who seeks benefits of cable television but without the risk of viewing, even inadvertently, patently offensive, sexually explicit material may be forced to chose all or nothing. He or she must either take cable programming in whatever preselected package the cable system or channel operator chooses or forego the benefits of cable television altogether.[235]

5. Accessibility to Children

The dissemination of nonobscene, but "patently offensive," sexually explicit material by means of a communication system that is easily accessible to children creates a serious problem. In *Pacifica* the Court held that greater regulation is permissible in such circumstances. In his concurring opinion Justice Powell explained that

> [s]ellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children . . . . The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children. This . . . is one of the distinctions between the broadcast and other media to which we have often adverted as justifying a different treatment of the broadcast media for First Amendment purposes.[236]

Likewise, in *Rowan*, the Court identified the parents' interest in protecting their children when it upheld the constitutionality of a postal

233. *See also* Weinstein, *supra* note 20, at 31 (stating that programmers, not consumers, make the choices); *supra* note 145-56 and accompanying text.

234. *See* Ross, *supra* note 23, at 30 (concerns of public interest representatives about cable operators' control of programming).

235. At present, the technological devices which are designed to screen out or lock out undesired programming do not appear to be very reliable. *See, e.g.*, Weinstein, *supra* note 20, at 32; Goldstein, *Cable TV's Shame: 'Gore-nography'*, N.Y. Times, July 3, 1984, at Y27, col. 6. The state of Utah proffered evidence in *Wilkinson (I)* that less than one percent of cable subscribers have lockboxes. *Wilkinson (II)*, 800 F.2d at 1003 (Baldock, J., concurring). Judge Baldock described the devices for screening out sexually explicit programming (program guides and lockboxes) as ineffective, burdensome, and complex. *Id.* at 33. He concluded that the benefits of cable television "should be available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours." *Id.* at 34.

236. 438 U.S. at 758, 759 (Powell, J., concurring) (citing Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977)); *see also* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973), Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-87.

regulation allowing a homeowner to have his name removed from mailing lists: "Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped."[237]

The Court has emphasized that protecting the well-being of a minor constitutes a compelling state interest,[238] and that a state may enact regulations to support the rights of parents to shelter their children from offensive expression and offensive behavior such as child pornography.[239] In 1968, the Court upheld a New York statute which prohibited the sale of "girlie" magazines to minors under the age of seventeen, even though the Court acknowledged that the magazines were not obscene and that sale of them to adults could not be prohibited.[240] Affirming a conviction under the statute, the *Ginsberg* Court declared that the parents' authority to direct their children's upbringing in the home is a basic part of American society. "The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[241] Thus, there is a powerful state interest in preserving and supporting the authority of parents as guardians and supervisors of what enters the home and is accessible to children. The state also has a strong interest in protecting children from exposure to material that may be harmful to their moral, emotional and social development.[242]

Because of the accessibility of children to television at all hours of the day and night[243] the government's right to restrict the transmission

237. Rowan v. United States Post Office Dept, 397 U.S. 728, 738 (1970).

238. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

239. New York v. Ferber, 458 U.S. 747, 764 (1982); *Pacifica*, 438 U.S. at 749, 750; Ginsberg v. New York, 390 U.S. 629 (1968).

240. Ginsberg v. New York, 390 U.S. 629 (1968).

241. *Id.* at 639 . In another case Justice Powell explained why state support for parental authority in childrearing has traditionally been favored by the Court.

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Bellotti v. Baird, 443 U.S. 622, 638-39 (1979) (plurality opinion).

242. *See* Bethel School District No. 403 v. Fraser, 106 S. Ct. 5159 (1986); *Ginsberg*, 390 U.S. at 640 Patterson v. Phoenix, 103 Ariz. 64, 69, 436 P.2d 613, 618 (1968); *see also* Chng & Giles, *Television, Children and Sexuality: The Need for Parents as Mediators*, 18 FAM. PERSPECTIVES 179 (1984) (citing studies establishing "the potential damage children may incur in several areas of the development: intellectual, social, psychological and sexual" from watching inappropriate television shows).

243. *See* V. PACKARD, OUR ENDANGERED CHILDREN: GROWING UP IN A CHANGING WORLD 94 (1983) (reporting Nielsen findings that close to 10% of preschool children and a quarter of grade school children are watching TV between ten and eleven p.m.; nearly five percent of preschoolers and 10% of gradeschoolers are watching TV between eleven p.m. and midnight); Chng & Giles, supra note 242, at 181 (Studies show that children spend 18,000 hours watching television, 50% more time than they spend in school, that children aged two to five watch an average of 31 hours of television each week, adolescents 25 hours per week, and that "from a very young age many children watch programs that were intended for adult audiences.").

of indecency over broadcast television is clear.[244] The *Pacifica* rule allowing reasonable regulations to protect children from indecent material carried over a readily accessible broadcasting medium is equally applicable to cable television.[245]

6. The Manner or the Form of Expression

The form of expression or speech affects its intrusiveness. The circumstances, method and manner of speech may make an enormous difference in the constitutional analysis. In his classic statement of this principle, Justice Holmes noted that "the character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[246] The nature of the government's interest implicated by this factor was identified by the Supreme Court in *Paris Adult Theater I v. Slaton*[247] as a concern for quality of life in our democracy.[248] Material that is patently offensive because it contains

244. *Pacifica*, 438 U.S. at 749, 750.

245. It is important to note that *Pacifica* upheld the "channeling" of inappropriate material away from children, not the total banning of it. If effective and reliable lockboxes and programming guides are available and affordable, and time-channeling is required, the interests of children may be largely capable of protection by the same method emphasized in *Ginsburg* — by parental supervision.

246. Schenck v. United States, 249 U.S. 47, 52 (1919). If one were to calmly invite theater patrons to leave the building because of fire danger, Justice Holmes' example would wither, because the form of expression, "*shouting* fire," is a key element in his example. *See also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words may be proscribed); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel may give rise to liability for damages).

247. 413 U.S. 49 (1973). It is important to distinguish this factor—the form of expression—from the other factors which pertain to the intrusiveness of speech. All four factors involve dual interests—the interest of the individual as well as the interest of the government. Thus, the privacy of the *home* or place of communication implicates the individual's interest in personal privacy as well as the government's interest in preserving the right to be left alone. The *captivity of the audience* implicates the individual's interest in choice and the government's interest in preserving the value of individual autonomy. The *accessibility of children* to indecent material implicates the interests of parents in raising their children and the governmental interest in protecting future generations from potentially corruptive material. Likewise, the *manner or expression of the speech* implicates the individual's right to be free from unreasonable and unsolicited influences which sabotage the quality of life as well as the government's interest in maintaining a safe and decent society. Of course, the government's interest in maintaining a safe and decent society will not support interference with the pursuit of nonthreatening but unpopular lifestyles by some individuals. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972); Cox v. Louisiana, 379 U.S. 559, 581 (1965) (Black, J., concurring and dissenting); Niemetko v. Maryland, 340 U.S. 262, 272-73 (1951). *See generally* New York Times v. Sullivan, 376 U.S. 254, 276 (1964); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-88 (1979).

248.

> Quite apart from [any linkage between obscene material and] sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:
>
> > It concerns the tone of society, the mode . . . the style and quality of life now and in the future . . . . Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not . . . .
>
> As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society."

lurid descriptions of sexual organs or activities is more intrusive upon the privacy, autonomy and decency which the Constitution protects than many other kinds of regulable speech.[249] Sexually explicit material has a tendency to degrade and cheapen women, to present women as objects to be used, and to deny women their right to individual dignity and choice.[250]

The regulation of sexually explicit material is really regulation of a form of expression than regulation of content.[251] Vulgarity is a matter of style, not substance; manner, not content. Any message or idea conveyed with offensive, sexually explicit depictions, or vulgar descriptions, can be conveyed without the offensive sexual depiction or vulgar description. The use of sexually explicit language or depictions jars for the same reason the use of profane, racist, or sexist language jars. Just as there are valid justifications for restricting the use of such language in certain contexts,[252] the restriction of sexually explicit expression may be reasonable in some contexts. This is what the Court meant in *Pacifica* when it likened pornography to a "pig in the parlor."[253]

This point may be difficult to comprehend if one is wedded to the pigeonhole doctrine of the first amendment that views sexually explicit material as *either* obscene and wholly unprotected *or* nonobscene and wholly protected. That "either/or" framework is not only overly simplistic and unrealistic, but inaccurate as a matter of fact and law. Factually, the line between technically obscene material and nonobscene, sexually explicit material, which is patently offensive to community values, is hazy at best. Indecent, sexually explicit material offends "for the same reasons that obscenity offends,"[254] only not to the same degree.

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413 U.S. 49, 58-60 (citations omitted).

249. It is important to distinguish material that is sexually explicit and patently offensive from material that merely contains nudity. This distinction was noted by the Court in *Erznoznik*. The Jacksonville drive-in movie ordinance which was invalidated prohibited outdoor movie theaters from showing films containing any nudity. Justice Powell, writing for the Court, emphasized that

> [t]he ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach.

422 U.S. at 213.

250. Note, *Antipornography Laws and First Amendment Values*, 98 HARV. L. REV. 460 (1984).

251. *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) ("proscribing intrusive and unpleasant *formats for expression*") (emphasis added).

252. For example, restrictions on the use of profane, racist or demeaning sexist language in courtrooms, classrooms, or churches, are not uncommon or unreasonable. *See* Riggs, *supra* note 161, at 273 n.78. *See also infra* note 259.

253. 438 U.S. at 750, 751.

254. 438 U.S. at 746 (Stevens, J., plurality opinion). Sexually explicit material in some respects partakes more of the characteristics of a drug than communication. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 181 (1982). The effects of sexually explicit material upon the immediate sexual condition of the recipient, may far exceed whatever impact it has on his or her rational-cognitive senses, if any. In this sense, sexually explicit material is more like a substance than speech; its transfer more clearly resembles commerce than communication.

And it may be restricted for the same reason that obscenity may be restricted, only not to the same degree.

Constitutionally, the "either/or" categorization of sexually explicit material is also inaccurate. In *Young v. American Mini Theatres, Inc.*, a majority of the Court agreed that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ."[255] Justice Stevens, writing for himself and three other members of the Court, expressed an even more forceful point of view when he added that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."[256] While the Court has held that nonobscene sexually explicit communication "is not without its First Amendment protections from official regulation,"[257] the Court has never declared that patently offensive, sexually explicit material is entitled to the same degree of protection under the first amendment that is provided for political speech, "the search for truth" in the sciences, and artistic expression.[258] Indeed, in a number of contexts, especially those involving children, the Court has emphasized that the constitutional protection accorded nonobscene but sexually explicit indecent material is of a lesser magnitude.[259]

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255. 427 U.S. at 61.

256. *Id.* at 70 (Stevens J., plurality opinion); *see also Schad*, 452 U.S. at 80 (Stevens, J., concurring). In *Pacifica*, Justice Stevens expressed his opinion that: "At most . . . the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, *they surely lie at the periphery of First Amendment concern.*" 438 U.S. at 743 (emphasis added). He further explained:

> The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary standards . . . . *[Indecent materials] offend for the same reason that obscenity offends.* Their place in hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth than any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. at 745, 746 (emphasis added).

257. *Schad*, 452 U.S. at 66.

258. *Id.* at 65. *See also* Garrison v. Louisiana, 374 U.S. 64, 74-75 (1964): "[S]peech concerning public affairs is more than self-expression; it is the essence of self government."

259. In New York v. Ferber, 458 U.S. 757 (1982), the Court acknowledged that the constitutional protection extended to certain lewd, albeit not obscene, sexual material was not very great. "The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*." *Id.* at 762. Although the Court was sharply divided in Board of Education v. Pico, 457 U.S. 853 (1982), concerning whether a public school library could remove nonobscene but somewhat offensive books, eight of the nine Justices expressed their opinion that the books could have been removed if they had been "pervasively vulgar." *Id.* at 871 (plurality opinion); *id.* at 890 (Burger, C.J., dissenting); *id.* at 897 (Powell, J., dissenting). In Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165-66 (1986), the Court held that the first amendment does not prevent a high school from disciplining a student for giving a speech filled with indecent sexual innuendoes in a school assembly.

B. *The Intrusiveness Of The Regulations*

Balanced against the degree of intrusiveness of the speech is the degree of intrusiveness of the regulation. Pigeonhole thinking on this side of the equation can be just as unrealistic and dangerous as pigeonhole notions about protected speech.

1. The Characteristics of the Medium of Communication

The nature of first amendment protection varies depending on the character of the medium being regulated. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[260]

The significance of the medium of communication for first amendment analysis does not depend upon the technical characteristics of the particular medium of expression. Rather, the constitutional significance of the medium of communication depends upon the impact that use of a particular medium may have upon protected constitutional interests. Each particular medium has some immutable limitations, and some media unavoidably implicate constitutionally significant factors such as the site of the communication, the degree of captivity of the audience and the accessibility of children. Thus, in assessing the constitutionality of the regulation of indecent material transmitted over cable television systems, the characteristics of cable television which affect other significant constitutional interests must be considered.[261]

For purposes of indecency regulation,[262] the analytically relevant characteristics of cable television are comparable to those of broadcast television.[263] Like broadcast television, cable television has a "pervasive

260. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981). "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). Each medium of communication "tends to present its own peculiar problems." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). *See also* Southeastern Promotions v. Conrad, 420 U.S. 546, 557 (1975).

261. The media characteristics which are analytically significant for one issue might be irrelevant to the analysis of another issue. Thus, the characteristics of cable that are significant for analysis of the constitutionality of indecency regulations may differ from those deemed relevant in assessing the constitutionality of access rules or antitrust regulations.

262. In assessing the constitutionality of other types of regulations including "must-carry" rules, access rules, and restrictions on competition, some courts have concluded that the analytically significant characteristics of cable television do not resemble broadcasting. *See, e.g.*, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1447-54 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); Preferred Communications v. Los Angeles, 754 F.2d 1396, 1403-10 (9th Cir.), *cert. granted*, 106 S. Ct. 380 (1985), *remanded*, 106 S. Ct. 1034 (1986). *But cf.* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1375-80 (10th Cir. 1981) (city's districting ordinance may consittute a first amendment violation), *cert. dismissed*, 456 U.S. 1001 (1982); Berkshire Cablevision v. Burke, 571 F. Supp. 976, 983-88 (D.R.I. 1983) (Rhode Island's mandatory access regulations do not violate the first amendment). However, even if the analytically significant characteristics of cable and broadcast television are distinguishable when the issue involves some sort of economic, market or operational regulation, they are indistinguishable when the issue is indecency regulations.

263. *See Wilkinson (II)*, 800 F.2d 1004-06 (Baldock, J., concurring). In *Midwest Video (II)* the Court acknowledged that cable television had become "enmeshed in the field of televi-

presence in the lives of all Americans,"[264] requires the near-exclusive use of a limited public asset[265] and sends its programs directly into the home[266] where sexually explicit programs may assault unsuspecting viewers[267] — including children.[268] These reasons justify the fact that broadcasting has received less first amendment protection than all other forms of communication.[269]

Cable television might also be compared with telephone communications because it is a cable-delivered communications medium. The transmission of indecent telephone communications, however, has long been prohibited by federal law in a similar manner and to a similar extent as indecent broadcasting.[270] In 1983, for instance, Congress amended the existing prohibition of indecent telephone communications to specifically address the problem of "dial-a-porn."[271] As amended, 47 U.S.C. § 223 makes it a crime to knowingly make an obscene or indecent communication by telephone to anyone under eighteen years of age or to anyone without consent.[272] The FCC enacted regulations providing that it would be a defense to prosecution if the defendant operated only between 9:00 p.m. and 8:00 a.m. or required payment by credit card before transmitting the indecent message.[273] In *Carlin Communications, Inc. v. FCC*,[274] the Second Circuit, while suggesting that some regulation would be permissible, set aside this order because the FCC had failed "to demonstrate that the regulatory scheme is well tailored to its ends or that those ends could not be met by less drastic means."[275] The Commission then promulgated a new regulation which provided a defense if the defendant had required payment for the telephone message by credit card or had required an authorized access or identification code which was issued only to applicants over the age of eighteen.[276]

The important distinction between the regulation of "dial-a-porn" and indecent cable television programming is that with "dial-a-porn" the objectionable communication is specifically obtained by the recipi-

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sion broadcasting" and that cable operators were "engage[d] in the functional equivalent of broadcasting" when they provided origination cablecasting. 440 U.S. 689, 700 (1979).

264. *See supra* pp. 650-51.

265. *See supra* pp. 650-56.

266. *See supra* pp. 656-59; *see also* note 80.

267. *See supra* pp. 659-61 and 663-65.

268. *See supra* pp. 661-63.

269. *Pacifica*, 438 U.S. at 726, 748-749.

270. 47 U.S.C. § 223 (1984).

271. 47 U.S.C. § 609 (1982 & Supp. III 1985); *see also* H.R. REP. No.356, 98th Cong., 1st Sess. 19, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 2219, 2235. *See generally* Cleary, *Telephone Pornography: First Amendment Constrainst on Shielding Children From Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503 (1985).

272. 47 U.S.C. § 223 (b)(1).

273. 49 Fed. Reg. 24,996, 25,003 (1984) (to be codified at 47 C.F.R. § 64.201).

274. 749 F.2d 113 (2d Cir. 1984).

275. *Id.* at 121. "The FCC must give us a record that shows, convincingly, that the regulations were chosen after thorough, careful, and comprehensive investigation and analysis." *Id.* at 123.

276. 50 Fed. Reg. 42,699 (1985) (to be codified at 47 C.F.R. § 64.201).

ent affirmatively requesting it, whereas cable television subscribers who receive the entire medium and specific cable television programs are not individually selected.[277] Thus, "dial-a-porn" regulations can be limited to the specific telephone number from which the offensive communications emanate, but indecent cable television programming, for better or worse, must be regulated on a broader basis.[278] In any event, the *Carlin* court did not suggest that the statute prohibiting indecent telephone communications to youth or unwilling recipients presented any constitutional problems.[279]

2. The Necessity for Other Regulation in the Public Interest

The legitimate need for government to regulate cable television systems in the public interest is well established.[280] In fact, the Tenth Circuit has declared that "government and cable operators are tied in a way" that necessitates the regulation of cable television in the public interest.[281] "That is, government must have some authority in such a context to see to it that optimum use is made of the cable medium in the public interest."[282] Although the extension of such regulations to encompass matters of programming decency is a relatively recent development, the power to protect the public interest in cable television[283] has long been recognized.[284] Since government must extensively regulate cable television, the resulting governmental entanglement creates a measure of public responsibility which may justify greater regulation of communications than would be justifiable if purely private means of communications were involved. Moreover, since cable television requires the use of the public domain, the public has a direct interest in preventing the exploitation of the public asset for private gain.

277. The analogy to cable television would be closer if "dial-a-porn" messages were automatically sent to all telephone subscribers, who only needed to pick up the telephone receiver to receive them, whether they wanted them or not, or if cable television systems operated on a pay-per-program basis. The latter is technically feasible and operational.

278. Like telephone communications regulations, cable television indecency regulations could also regulate at the reception point, not the point of transmission. But the burden imposed upon users for the benefit of the commercial profiteer and the difficulty of practical enforcement renders this manner of regulation less preferable. *See generally* 50 Fed. Reg. at 42,702-07 (1985) (to be codified at 47 C.F.R. § 64.201).

279. 749 F.2d at 123. The court did not address the constitutional issue. *See also* Carlin Communications, Inc. v. South Central Bell Tel. Co., 461 So.2d 1208 (La. App. 1984) (upholding tariff on intrastate telephone calls prohibiting obscene or sexually explicit communications).

280. *See* S. RIVKIN, CABLE TELEVISION: A GUIDE TO FEDERAL REGULATIONS(1974); Albert, *The Federal and Local Regulation of Cable Television*, 48 U. COLO. L. REV. 501, 508-18 (1977); Barnett, *State, Federal and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685, 690-708 (1972). *See generally infra* notes 189-190 and accompanying text.

281. Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1378 (10th Cir. 1981), *cert. dismissed*, 452 U.S. 1001 (1982).

282. *Id.* at 1379. *See supra* note 186.

283. The public interest includes the morals of the community and the privacy of its citizens as well as the property interest of the city whose easements carry the cable.

284. The British CABLE INQUIRY stressed the public interest in preventing the "impoverishment" of television programming. CABLE INQUIRY, *supra* note 46, at 7; *see also* WHITE PAPER, *supra* note 47, at 6.

3. The Type of Regulation Imposed

While regulation of media-operators is not unconstitutional,[285] nevertheless, regulations which may restrict the dissemination of speech are closely scrutinized. The more comprehensive the regulation or the more severe the sanction imposed upon violators, the greater the burden of justifying the regulation. With respect to cable television regulations, two considerations are paramount: whether the regulation absolutely prohibits communication or merely channels it through "time, place, and manner" regulation, and whether the sanctions imposed are civil or criminal.

a. *Time, Place and Manner Restrictions*

If a regulation is deemed a time, place, and manner regulation of speech, the standard of first amendment review shifts from strict scrutiny to something less inflexible. The Court looks to whether the regulation reasonably advances an important state interest.[286] If so, the time, place, and manner restrictions must be upheld. To be reasonable, restrictions on communication must provide alternative times, places, and manners in which the communication may occur.[287] In other words, "[w]hile the first amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."[288]

This was the fatal flaw in the federal statute which totally prohibited mailing unsolicited advertisements for contraceptives which the Supreme Court invalidated in *Bolger v. Youngs Drug Products Corp.*[289] Distinguishing *Rowan*, which upheld a statute giving addressees the right to prevent purveyors of personally offensive, sexually explicit materials from sending such materials to them through the public mails, the Court stressed the difference between narrowly drawn restrictions and blanket prohibitions. "[W]e have never held that the Government itself can shut

285. For example, the first amendment does not immunize owners and operators of communication systems from nondiscriminatory regulations and responsibilities. Owners, operators and users of mass communications media may be liable for violating sexual vice laws, Arcara v. Cloud Books, Inc. 106 S. Ct. 3172 (1968); antitrust laws, Citizens Publishing Co. v. United States, 394 U.S. 131 (1969); Associated Press v. United States, 326 U.S. 1 (1945); labor laws, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); laws prohibiting door-to-door solicitation, Breard v. Alexandria, 341 U.S. 622 (1951); for ignoring subpoenas, or refusing to give testimony, Branzburg v. Hayes, 408 U.S. 665 (1972); and for general tax liabilities, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585-86 (1983); Cammarano v. United States, 358 U.S. 498 (1959).

286. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n.17 (1982); Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 581 n.18 (1980).

287. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75 (1981); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Kovaks v. Cooper, 336 U.S. 77, 85 (1949).

288. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810-13 (1984); *see also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73-4 (1983); Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 (1980); *Globe Newspaper Co.*, 457 U.S. at 607; *Grayned*, 408 U.S. at 117.

289. 463 U.S. 60 (1983).

off the flow of mailings to protect those recipients who might potentially be offended."[290] Acknowledging the importance of protecting family privacy in the home and what children see, the Court emphasized that the means of achieving those purposes were overbroad. "We . . . conclude that the justifications offered by [the Government] are insufficient to warrant the sweeping prohibition on the mailing of unsolicited contraceptive advertisements."[291] Thus, a total ban of all indecent cable television programming would be subject to a stricter standard of judicial scrutiny than regulations merely attempting to "channel" indecent material to times and channels where unsupervised children and unwilling adults would not be exposed to it.[292]

Channeling cable television programing is not as simple as channeling printed matter. The purchaser of printed matter can inquire about the content before accepting a book or magazine, and the content of the book or magazine does not change. Distribution can be accurately and somewhat effectively channeled at the point of sale of the printed matter. On the other hand, the subscriber or purchaser of cable or broadcast television obtains a medium that generally delivers a continuous flow of programming, the content of which is continually changing and not known at the time of purchase. Thus, regulating the sale or subscription of the television set or cable hook-up would not effectively channel the programming. Nevertheless, some degree of "channeling" sexually explicit cable television programming may be achieved without absolutely banning it.

Most of the cable indecency laws that have been invalidated have not been "channeling" regulations. The statute and ordinances involved in the *HBO*, *Roy City* and *Cruz* cases appeared to totally ban all nonobscene but indecent programming from cable television. In so doing, Roy City, Miami, and the state of Utah may have committed the same error condemned by the Supreme Court in *Butler v. Michigan*,[293] where it noted: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[294]

On its face, however, the Utah statute involved in *Wilkinson* only re-

290. *Id.* at 72.

291. *Id.* at 75. In NAACP v. Button, 371 U.S. 415, 438 (1963), the Court observed that "[b]road prophylactic rules in the area of free expression are suspect." *Id.* at 438.

292. *Pacifica*, 438 U.S. at 757 (Powell, J., concurring); *see also* Metromedia v. City of San Diego, 453 U.S. 490, 521-27 (1981) (Brennan, J., concurring); *id.* at 553-55 (Stevens, J., dissenting).

293. 352 U.S. 380 (1957).

294. *Id.* at 383. On the other hand, the Supreme Court in *Pacifica* upheld the application of a similar statute which, on its face, also appeared to totally prohibit all indecent broadcasts by construing the prohibition to entail consideration of the time, place, and manner of the broadcast. 438 U.S. at 742, 750. It is possible that the Roy City and Miami ordinances could also be interpreted in the same manner. Both ordinances explicitly defined "indecent material" with reference to "community standards" and "patently offensive." *Roy City*, 555 F. Supp. at 1176; *Cruz*, 571 F. Supp. at 127. These terms could be interpreted as requiring consideration of the time, place, and manner in which the sexually explicit material was transmitted. However, this modest construction apparently was not intended by the draftsmen of either ordinance.

quired cable operators to broadcast sexually explicit programming at a time or in a context that was not patently offensive to the community of cable television watchers. The district and appellate courts' failure to grasp the significance of that distinction, the mischaracterization of the Utah law as a de facto ban of indecent cable programming, and the reliance on inapposite cases dealing with laws that totally prohibited indecent cable programming were major flaws in the *Wilkinson* courts' analyses.[295]

A reasonable time, place, and manner restriction cannot be based upon the content of speech.[296] It has been argued that regulations restricting the communication of sexually explicit indecent material cannot be analyzed under the "time, place, and manner" test because such regulations are content based.[297] However, the very title of "time, place or *manner*" regulation recognizes that regulation of the *manner* or form of expression is not necessarily content or viewpoint regulation. Thus, some restrictions based upon the form of expression, including fighting words,[298] and sexually explicit material or activities have also been reviewed under a less demanding standard of review.[299]

In fact, the Court has never applied strict scrutiny to regulations

295. After an excellent analysis of other issues, Judge Baldock's concurring opinion stumbled on this point when he summarily concluded, without analysis, that the Utah law entails an absolute prohibition even though it referred to "time, place, manner and context" of programming. *Wilkinson (II)*, 800 F.2d at 1007 (Baldock, J., concurring). His and Judge Anderson's concern over the vagueness of the broad "time, place, manner, and context" standard seems premature in a case involving a facial challenge to a newly enacted, never enforced state law, especially in light of the precise guidelines issued by the Utah Attorney General. *Id. See also infra* notes 312-15 and accompanying text.

296. For instance, in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), the Supreme Court held unconstitutional an order of the New York Public Service Commission prohibiting inclusion by utilities in their monthly bills of inserts discussing public issues. In explaining why that regulation was subject to a strict standard of scrutiny, the Court stated that "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's view.' " *Id.* at 536 (*quoting* Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)). The Court went on to declare: "Governmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Id.* at 536 (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (citation omitted). *See generally* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976).

297. *See generally* Stone. *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 87, 111-12 (1978). *But see* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (finding a park rule that banned camping to be content-neutral, even though only advocates of one political position sought to express their position by camping in the park).

298. Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942); Schenck v. United States, 249 U.S. 47, 49-51 (1919).

299. *See Clark*, 468 U.S. 298-99; *Pacifica*, 438 U.S. at 750; Young v. American Mini-Theaters, Inc., 427 U.S. at 58; *Miller*, 413 U.S. at 15; *see also Bethel School District*, 106 S. Ct. 3159 (1986); Local Educators Ass'n v. Hohlt, 652 F.2d 1286, 1295 (7th Cir. 1981), *aff'd sub nom.*, Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 103 S. Ct. 948 (1983). In *Erznozkik*, the Court specified two clear exceptions to the proposition that content-based restrictions are not reasonable time, place and manner restrictions. "Such selective restictions have been only upheld when the speaker intrudes upon the privacy of the home . . .

which attempt to channel, rather than totally ban, sexually explicit indecent material. This is because indecent sexual explicitness is more akin to a *form* of expression, rather than *content*.[300] Therefore, viewpoint-neutral regulations restricting vulgar or indecent sexual explicitness,[301] may be subject to a more deferential standard of judicial review as reasonable time, place, and manner restrictions.[302]

b. *Sanctions*

A second factor to be considered in evaluating an indecency regulation is the severity and type of sanctions involved. The Court in *Pacifica*, apparently found the absence of criminal sanction significant in analyzing the permissibility of the regulation involved in that case.[303] Likewise, the civil nature of the nuisance penalty imposed on an adult bookstore was particularly noted by the Supreme Court when it approved the closure of a bookstore.[304] Justice Stevens has repeatedly emphasized the difference between criminal sanctions and civil sanctions. In his dissenting opinion in *Smith v. United States*,[305] he questioned the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material. He was dismayed that "the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law."[306] Justice Stevens noted that "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct."[307] Additionally, when sanctions are considered, the "chilling" effect of such measures must be taken into account. An excessive sanction may have a very broad impact if it is so severe that persons will be compelled to take extreme precautions to avoid its imposition. On the other hand, modest sanctions[308] which do not involve the taint of criminal enforcement or the direct risk of incarceration might be accorded

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or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." 422 U.S. at 209

300. There are many less offensive and harmful ways to communicate the message that sexual intercourse is pleasurable than to show a happy man and woman copulating. Advocates of traditional, strict morality, as well as advocates of new, liberated moralities are obliged to refrain from vulgar forms of expression.

301. For example, depictions of sexual activities which are patently offensive to the community.

302. In *Consolidated Edison* the Court described the ordinance in *Erznoznik*as one which "discriminates among movies solely on the basis of content." 422 U.S. at 211. The ordinance, however, was written to ban nudity in movies; not sexually explicit indecent material. Nudity *per se* is not necessarily vulgar, indecent, or even sexually explicit (e.g. nude babies and naked tribal natives, etc.) Viewed in this light, there is no disharmony between *Erznoznik* and *Rowan*.

303. 438 U.S. at 739 n.13, 750.

304. *See* Arcara v. Cloud Books, Inc., 106 S. Ct. 3172 (1986).

305. 431 U.S. 291 (1977).

306. *Id.* at 316 (Stevens, J., dissenting).

307. *Id.*

308. Examples of modest sanctions include license suspension, civil liability, and nuisance abatement.

more leeway in judicial review.[309]

4. The Context of Enforcement

In *Pacifica* the Supreme Court emphasized that "context is all-important."[310] In his concurrence, Justice Stevens added that "indecency is largely a function of context—it cannot be adequately judged in the abstract."[311] Thus, it appears that the constitutionality of regulations restricting indecent programming on cable television will turn, at least in part, on the context of enforcement.

Without the concrete setting of an actual case, there is a significant risk that a court may sacrifice justice to theory. As the Seventh Circuit has noted: "There is, however, a big difference between the danger of an abuse and the abuse itself; and it is a fair question how far the courts should go in making municipalities rewrite their cable television ordinances to prevent dangers that may be largely hypothetical."[312]

Deciding the constitutionality of indecency regulations without the benefit of a complete factual record which sets forth the context of enforcement is disfavored, in part, for much the same reason that prior restraints on speech are disfavored: a court may base its judgment on assumptions concerning statutory interpretation or application which have no factual foundation. Two hundred years of constitutional history teaches us that the best rules for governing the affairs of free citizens do not spring fully developed from the pens of our judges or the mouths of our legislators; rather, they evolve from the process of applying proven legal principles to actual life experiences. Thus, in assessing the constitutionality of cable television indecency regulations, courts must be wary of prematurely pronouncing judgments intended to establish or vindicate general principles of law. The best safeguard against judicial dogmatism is the traditional rule requiring an actual case and controversy before judges may rule on the constitutionality of controversial laws. Only when all the facts are known may the challenged regulations be accurately adduced, allowing for a realistic appraisal of the risks, benefits, and excesses of the law.

On this point both of the courts in *Wilkinson* committed error. Dealing with a unique time, place and manner statute that was challenged immediately upon its enactment for facial unconstitutionality, the dis-

309. In *Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court emphasized that it had long ago "rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance." *Id.* at 805.

310. 438 U.S. at 750.

311. *Id.* at 742 (Stevens, J., concurring).

312. Omega Satellites Prod. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982). In a similar vein, the Tenth Circuit underscored the importance of the particular facts:

> Whether that power [to regulate cable television] has been permissibly exercised by the City in this case calls for *a particularized inquiry* into the unique attributes of the cable broadcasting medium. The district court is best suited for such inquiry in the first instance upon *a fully developed factual record.*

Community Communications, 660 F.2d 1370, 1380 (10th Cir. 1981) (emphasis added).

trict court refused to consider evidence of the nature of programming shown over the long cable system. The court also rejected as immaterial evidence of the technological ability and legal right of the plaintiff cable operator to prescreen questionable programming and to "time-shift" potentially offensive programming to later hours.[313] The court's only justification for its abstract approach was that "[f]ew facts are relevant to a facial challenge, because the issue is not analyzed in a factual context."[314] This is both a misstatement of the rule and a misapplication of it. Indecency, like obscenity, "cannot be adequately judged in the abstract."[315] The Tenth Circuit's summary affirmance also neglected this principle.

C. *The Balance of Harm*

In a broad sense, the constitutionality of a law regulating the transmission of sexually explicit indecent programming over cable television entails a balancing of the regulator's rights against the public's interest. Functionally, the constitutional analysis entails consideration of (1) the nature and comparative value of the competing interests; (2) the relative cost and burden to individuals of vindicating those interests; (3) the ability to obtain redress for speech-created harm through means other than regulation; and (4) the availability of effective, less-restrictive measures to protect legitimate public interests.

1. The Value of the Competing Interests

Opponents of cable indecency regulations defend two legal interests: the general interest in protecting uncensored communications and the specific interest in protecting sexually explicit indecent materials. The former is of paramount value; the latter is trivial. Freedom of speech is the premiere constitutional right because it is an indispensable ingredient of self-government. The extraordinary judicial protection accorded the right to speak underscores the preeminence of this constitutional interest. Yet even freedom of speech is not absolute. Despite the occasional chiding of articulate dissenters, the Supreme Court has never given a literal construction to the declaration that "Congress shall make *no* law . . . abridging the freedom of speech . . ."[316]

The second interest is less noble. Indeed, the value of sexually explicit indecent material to society and to individuals is *de minimis*. At best it may have some entertainment value; at worst it may cause exploitive and demeaning anti-social behavior. Our democracy, nevertheless, tolerates such material, *not* because erotic material has any significant intrinsic social or personal merit, but because society is concerned about the grave dangers of abuses of power inherent in the suppression of *any*

313. *Wilkinson (I)*, 611 F. Supp. 1099, 1107 (D. Utah 1985).
314. *Id.*
315. *Pacifica*, 438 U.S. at 742; *see also Erznoznik*, 422 U.S. at 216.
316. U.S. CONST. amend. I. (emphasis added).

speech.[317]

Proponents of indecency regulations are also concerned with protecting two interests: the interest in decency and the interest in access to and use of modern mass communication systems. Protecting the latter interest contributes to the quality of life and enhances the processes of social interaction and interdependence upon which our democracy depends. The interest in decency implicates another aspect of the first amendment, because it involves the practice of moral beliefs. Indeed, to the extent that cable television involves government action, the right to be free of morally offensive intrusions assumes greater constitutional importance. Yet, the primary claim to constitutional protection of decency relates to individual's right to be let alone,[318] without having to forego a valuable educational and social medium.

2. The Cost of Vindicating Protected Interests

The cost and burden of vindicating these conflicting interests requires an appreciation of the realities of cable television programming and marketing as well as an understanding of the practical and legal effects of the challenged indecency regulation. Without regulation, cablecasters may force those who object to having sexually explicit indecent material accessible through their television to make an all-or-nothing choice: either to forego the benefits of cable television altogether or to accept some encroachment upon their personal standards of decency. On the other hand, cable operators may voluntarily segregate sexually explicit indecent programming so that the real benefits of cable television are available to subscribers without offensive programming.

A total prohibition of all sexually explicit indecent programming on cable television may significantly inconvenience consumers by forcing them to go elsewhere to receive such entertainment.[319] Mere "channeling" regulations, however, would impose less onerous burdens upon those who wish to have access to erotic material via cable television.[320]

Once the competing burdens are clarified, one must weigh the costs of access to a constitutionally protected interest against the cost of avoiding injury to that constitutionally protected interest. Sexually explicit programming may reasonably be viewed as an "extra" service pro-

317. *Miller*, 413 U.S. at 23-4.

318. *See* Redrup v. New York. 386 U.S. 767, 769 (1967).

319. On the other hand, since there are a number of established communications outlets for sexually explicit communications such as "adult" bookstores, "adult" video stores, "adult" theatres — a total ban of sexual programming from a pervasive, indiscriminant, home-based medium of communication might not be deemed to significantly burden access to such entertainment. After all, the ban would not close down any preexisting media of sex communication, nor would it preclude development of new technologies which are not public and pervasive.

320. Of course, if cable channel owners or operators were unable to legally or technologically screen out, edit or delay telecasting sexually explicit material, the burden of some regulatory schemes would be heavy indeed, but that does not appear to be the case. *See generally* Motavalli, *New Pay Service Planned for HBO*, CableVision, Nov. 4, 1985, at 11 (describing new offering by HBO for older people with some films "possibly being edited to tone down strong language, sex and violence").

vided by cablecasters, for which an extra cost or burden is appropriate.[321] Regulations requiring cablecasters to "channel" their indecent programming can be viewed as merely "time-shifting" or "channel shifting" measures. Time, place and manner restrictions on transmission of this material merely places the burden of taking the initiative on those who wish to view sexually explicit indecent material on their cable system. Such restrictions eliminate the correlative burden of avoidance from those who do not want to have sexually explicit material intrude into their homes and families at all hours of the day. As Judge Baldock explained, "it is unreasonable to shift an affirmative duty onto every parent to study all cable television program listings each week, even assuming such listings provide adequate warning."[322]

3. The Ability to Obtain Redress

Public regulation of communication should be permitted only to the extent that private remedies fail to adequately compensate persons injured by communication. The principle of private accountability is one of the unarticulated assumptions upon which the first amendment is predicated.[323] The first amendment expresses a preference for private redress over public regulation as a means of achieving the legitimate goals concerning communications.[324] To the extent that individuals can obtain private redress for injuries inflicted through communication, the anti-government regulation policy of the first amendment is enhanced.

Ideally, cablecasters should be held accountable though private civil litigation for harms caused by their unreasonable programming, and there should be no need for public regulation of cable programming. But in our imperfect world it is sometimes necessary to supplement private remedies with public regulation to achieve justice. Some types of injuries are not appropriate for private monetary restitution, and many plaintiffs cannot afford the time, energy or money to pursue private remedies. The "chilling" consequences of some private actions might seriously impair values and practices protected by the first amendment. Public regulations are not as precise and may not achieve the quality of justice in some cases as private remedies, but they may achieve a greater measure of justice for some individuals and for society as a whole. In fact, for some types of injuries, public regulation may provide a more adequate and just form of relief than any private remedy.

321. *See generally* 50 Fed. Reg. 42,706-07 (1985) (to be codified at 47 C.F.R. § 64.1) (it is inappropriate to put the burden of restricting access to "dial-a-porn" on an individual telephone subscriber).

322. *Wilkinson (II)*, 800 F.2d at 1006 (Baldock J., concurring).

323. That is, as between public accountability through public regulation such as laws and ordinances and private accountability through private channels of influence such as religion, morals, and market forces, the first amendment chooses private accountability.

324. That is, by prohibiting laws restricting speech, the first amendment forces parties to resort to methods and institutions of private redress to implement and protect legitimate interests affected by speech. The primary concern of the first amendment is to keep the potentially oppressive tools of public regulation away from disputes about speech and expression.

Private redress is an inadequate means of protecting adults and children from sexually explicit programming. Community interests are subverted by the unrestricted exploitation of cable programming for private profit. Market forces have not deterred cable operators from disregarding these interests in their pursuit of maximum capital return. The kinds of injury inflicted by offensive, sexually explicit cable programming is not amenable to relief by ordinary private adjudication. Both the nature of the private interests affected and the improbability of significant monetary recovery discourage private actions.

Reasonable regulations requiring cablecasters to channel the presentation of sexually explicit indecent programming so as to shield discriminating viewers from the unwanted intrusion of indecent programming fall well within constitutional bounds under the principle of accountability through regulation.[325] Regulations requiring cablecasters to channel their indecent programming provide a "floor" of protection to minimize the infliction of injuries that are inadequately remedied through traditional private actions. Such regulations may also serve to protect the cable television industry from excessive litigation, thereby providing an alternative means of dispute resolution. Laws banning all nonobscene "indecent" programming on cable television, however, go beyond accountability. Blanket prohibitions of all nonobscene but indecent programming usurp rather than complement the function of private restitution.

4. The Availability of Less-Restrictive Regulations

The first amendment also mandates a preference for less-restrictive regulations over more-restrictive regulations so long as the former preserves legitimate governmental interests. Even restriction of communications intended to further an important public interest will be sustained only if it is "no greater than is essential to the furtherance of that interest."[326] Regulations which only affect the time, place or manner of communications must reasonably advance important public interests and may not shut off access to alternative channels of communication. In short, the first amendment mandates that speech restrictions be narrowly drawn and that the regulation "extend only as far as the interest it serves."[327] Thus, laws absolutely banning indecent cable programming must pass stricter judicial scrutiny than laws requiring the channeling of such programming. Given the emphatic judicial solicitude for free speech in all media, an *absolute* ban of cable indecency is unlikely to be

325. *See generally supra*, pp. 669-73.

326. United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984); Procunier v. Martinez, 416 U.S. 396, 411 (1974); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1451 (D.C. Cir.1985); Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1405-06 (9th Cir. 1985).

327. Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 (1980) (citation omitted); *see also* Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 607 (1982); Grayned v. City of Rockford, 408 U.S. 104, 117 (1972).

upheld by any court — despite the existence of alternative media for communicating the same material.[328]

There are, however, many methods of channeling sexually explicit cable programming which provide substantial protection for viewers who do not wish to be confronted by offensive programming in their homes. For instance, laws could effectively segregate sexually explicit programming on cable television by: (1) requiring cable system operators to disclose to potential customers at the time of subscription the type of potentially offensive programming conveyed over specific channels; (2) restricting all offensive programming to certain channels or pay-for-viewing systems; (3) requiring that channels transmitting offensive programming be optional or extra-tier services; (4) requiring that transmission of offensive programming via cable be "scrambled" so that only viewers with decoding devices[329] could receive it; (5) requiring that effective lockboxes[330] that scramble unwanted signals be made available at no or low cost to subscribers; (6) restricting offensive programming to those times when children would be less likely to be in the viewing audience; or (7) requiring program guides that identify potentially offensive programming be provided at no or low cost to all subscribers. These regulations would entail less restriction of and impose less burden upon first amendment interests than an absolute ban of indecent cable television programming. These restrictions should be upheld, because they only channel the time, place or manner of a particular form of expression; clearly further legitimate public interests,[331] and they leave reasonable opportunity for cable communication of offensive nonobscene programming to those who desire it.

Finally, while the first amendment mandates less restrictive alternatives it does not require states to employ ineffective regulatory mechanisms simply because they are less restrictive than effective regulations, nor does it demand that the particular regulatory scheme be *the very least* restrictive. The "superlative" standard suggests an illusory, objective determination when, in reality, the differences between different regulatory schemes are more a function of subjective judgment and knowledge of particular circumstances. Politically responsible local officials are best suited to make these determinations. A "superlative" standard merely provides a smokescreen by which philosophically fossilized judges might substitute their own judgment for those who are better informed. Time,

328. *See supra* note 319 and accompanying text. *Pacifica* approved of a statute that facially prohibited indecent radio broadcasting. The Court's emphasis on the specific context, however, underscores the assumption that some applications of across-the-board prohibitions would surely fail judicial review. *See* 437 U.S. at 750, 751.

329. Such devices are already available for telephone communications. *See* 50 Fed. Reg. at 42,702-707. Similar technology is used in pay-per-view cable television operations.

330. At present lockboxes are ineffective; they block whole channels, not just particular programs, and "the unwanted complexity that these devices introduce into television viewing is attested to by their lack of use." *Wilkinson (II)*, 800 F.2d at 1006 (Baldock, J., concurring). *See supra* note 235.

331. They protect viewer choice, prevent viewer "capitivity," protect the welfare of youth and children, and foster the family quality of the community.

place and manner regulations need not submit to such subjective, transitory analyses — they should be sustained if they are narrowly drawn and *reasonably* necessary to further legitimate public interests.

IV. Federal Nonpreemeption of State and Local Regulation

A. *State and Local Regulations*

The controversy over indecent cable television programs has captured the attention of a growing number of lawmakers in state and local government. Recently, in more than a dozen states legislation has been proposed to regulate the flow of offensive programming over cable television.[332] Additionally, ordinances restricting the distribution of offensive programming over locally licensed cable television systems have been proposed or enacted in many towns and cities.[333]

In June of 1983, a grand jury in Cincinnati "indicted Warner Amex Cable communications on four obscenity counts for the showing of two sexually explicit films on the Playboy Channel."[334] Likewise, in February of 1985, a grand jury in Virginia Beach, Virginia, indicted a cable television company on seven counts charging violations of the state anti-obscenity statute for transmitting seven movies that were carried on The Playboy Channel.[335] In August of 1985, an Oklahoma City grand jury considered indicting a cable company which carried The Playboy Channel.[336]

B. *Federal Statutes and Regulations*

Recently there have been significant indications that federal lawmakers are concerned about the transmission of sexually explicit material over cable television.[337] Until October 30, 1984, the only relevant

332. *Operators Opposing Penn. Obscenity Bill*, CableVision, Jan. 20, 1986, at 23; *Florida Systems Prepare to Fight 'Obscenity' Ban*, CableVision, Jan. 20, 1986, at 23 (eleventh bill to restrict cable porn in six years in Florida); Smith, *supra* note 22, at 22, col. 3; Hofbauer, *supra* note 161, at 174-81; *Calif. Faces 'Cableporn' Bill*, CableVision, May 7, 1984, at 57.

333. Such ordinances have been enacted in Miami, Florida, Milwaukee, Wisconsin, and Roy City, Utah, and have been proposed in many other communities. *See* Weinstein, *supra* note 20, at 29 (describing attempts to restrict sexual cable programming in Rochester, New York, Buffalo, New York, Memphis, Tennessee, and Vista, California); *Newswire*, CableVision, June 18, 1984, at 11 (reporting defeat of Escondido, California, ballot proposition to ban "indecent" cable programming by 289 votes: 7,955 for, 8,244 against).

334. Smith, *Battle Intensifying*, *supra* note 22, at 22, col. 6. The case was later settled.

335. *Obscenity Charges Brought Against Cox Cable System*, CableVision, Feb. 18, 1985, at 11. The investigation began when local ministers and church groups petitioned the city council to not grant a rate increase requested by the cable company unless it dropped The Playboy Channel. The city council balked at the pressure, but passed a resolution asking the commonwealth's attorney to investigate the complaint. The prosecutor showed nine Playboy Channel movies to a grand jury which handed down seven indictments. *Id.* Three weeks later the cable company announced that it was dropping The Playboy Channel. *Cox Operator Drops Playboy Channel in Face of Obscenity Indictments*, CableVision, Mar. 4, 1985, at 16.

336. Wolfe, *Indictments Against Cox System Mixed*, CableVision, Aug. 26, 1985, at 20. The grand jury decided not to indict, finding the program ming was not "legally obscene." *Id.*

337. In 1976 Senator Pastore, acting at the request of the Federal Communications

statute was 18 U.S.C. § 1464 which prohibits the uttering of "any obscene, indecent, or profane language by means of radio communication. . . ."[338] Section 1464, however, specifically addresses "radio" broadcasting. While cable television arguably uses "radio" to receive microwave, satellite, and broadcast transmissions, programming originated by a cablecaster and transmitted through its cable system would not be covered.[339] Since this section only penalizes one who "utters language" it would not appear to cover the transmission of pictures.[340]

The Cable Communications Policy Act of 1984,[341] however, contains two provisions designed to control the problem of sexually explicit indecent cable programming. Section 639 imposes a penalty of up to two years' imprisonment or a fine of $10,000, or both, upon anyone who "transmits over any cable system any matter which is obscene or *otherwise unprotected* by the Constitution . . . ."[342] Additionally, section 624(d)(2)(A) requires cable operators to provide customers upon request a device to prohibit the viewing of a particular cable service during

Commission, introduced Senate Bill 3858. S. 3858, 94th Cong., 2d Sess., 122 CONG. REC. 33,359 (1976). This bill would have amended section 1464 to explicitly prohibit transmission of obscene or indecent material over cable television. It would have provided an affirmative defense to the dissemination of indecent material, however, if the material had been transmitted on a pay-per-program basis or by other means which would have minimized the risk that children under twelve or unwilling adult viewers would be exposed to the indecent material. *Id.* In 1982 Senator DeConcini proposed Senate Bill 2136. This bill would have made it a federal crime, punishable by up to one year imprisonment and/or a fine of up to $5,000, for "distributing any indecent or profane material, by means of television or cable television communications." S. 2136, 97th Cong., 2d. Sess. (1982). In 1984, Senator Helms introduced Senate Bill 2769. S. 2769, 98th Cong., 2d Sess., 130 CONG. REC. § 7320-23 (daily ed. June 14, 1984). That bill would have amended section 1464 by adding the term "indecent" to the prohibition sections; it would have specified that "broadcasting, telecasting, or cablecasting" of obscene, indecent or profane material was prohibited; it would have clarified that indecent "material" as well as "language" is prohibited; and it would have expressly preserved the authority of state and local governments to regulate obscenity, indecency, and profanity "in a manner which is not inconsistent with this section." *Id.* (statement of Senator Helms). In May, 1985, Senator Helms introduced and Congress enacted the "Cable-Porn And Dial-A-Porn Control Act," to outlaw the transmission of "obscene, indecent or profane" material on cable television, and to subject offenders to the possibility of two years in prison, a $50,000 fine, or both. S. 1090, 99th Cong., 1st Sess. (1985).

338. *See supra* note 16. However, two additional statutes could arguably apply to cable programming: § 1462, which prohibits interstate carriage on common carrier of "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, *or other matter of indecent character*, . . ." 18 U.S.C. § 1462(a)(1982) (emphasis added), and § 1465, which proscribes the transportation in interstate commerce "for the purpose of sale or distribution [of] any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription, or other article capable of producing sound *or any other matter of indecent or immoral character* . . . ." 18 U.S.C. § 1465 (1982) (emphasis added).

339. The Justice Department is studying whether 18 U.S.C. §§ 1462, 1464-65 may be applied to cable programming. *Justice Probes Cable Obscenity Issue*, CableVision, May 20, 1985, at 11.

340. *See* Letter from Stephen S. Trott, Assistant Attorney General, Criminal Division, to Senator Helms (May 24, 1984) *reprinted in* 130 CONG. REC. S7,321 (June 14, 1984).

341. 47 U.S.C.A. §§ 521-59 (West Supp.) [hereinafter cited as C.C.P.A.].

342. 47 U.S.C.A. § 559 (West Supp. 1986) (emphasis added). This provision originated as as amendment proposed by Representative Dannemeyer.

selected periods so that subscribers may "restrict the viewing of programming which is obscene or *indecent*."[343]

At present there are no federal regulations prohibiting or restricting nonobscene sexually explicit cable television programming.[344] Following enactment of the C.C.P.A. of 1984, the FCC repealed its only cable indecency regulation, because it was covered by the newly-enacted statutory provisions.[345] The FCC has never been very active in attempting to regulate indecency or obscenity on television, much less cable television. Indeed, the Commission has never brought an enforcement action against a television station or programmer, broadcast or cable, for violation of the indecency or obscenity standards.[346] If anything, the Commission has indicated a strong preference for local or state regulation in that area. In 1981, the Commission recommended to Congress that the statute giving the FCC responsibility for enforcing obscenity and indecency regulations be repealed, leaving the responsibility to the states and the Justice Department.[347] While Congress was considering the C.C.P.A., the Chairman of the FCC wrote to Senator Helms expressing "serious reservations" about the Commission's role in regulating indecency and obscenity on cable television.[348] Nearly a year after the C.C.P.A. was enacted an FCC official, speaking at a cable industry meeting, reportedly "made it clear that the FCC would not be a factor in the controversy over 'indecent' programming on cable television."[349]

343. 47 U.S.C. § 544(d)(2)(A) (West Supp. 1985) (emphasis added). This provision originated as an amendment proposed by Representative Bliley.

344. Until 1984, the only FCC regulation concerning the transmission of indecent material over cable television provided: "No cable television system operator when engaged in origination cablecasting shall transmit or permit to be transmitted on the original cablecasting channel or channels material that is obscene or indecent." 47 C.F.R. § 76.215 (1984). The term "cablecasting" referred to "[p]rogramming (exclusive of broadcasting signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." *Id.* at § 76.5(V). The FCC has emphasized that there is a distinction between the programming on "access type channels," on the one hand, and "programming subject to the system operator's editorial control," on the other Cable Television Channel Capacity and Access Channels Requirements, 45 Fed. Reg. 76, 178 (1980); *see also* Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251 [sic], 87 F.C.C.2d 40 (1981).

345. 50 Fed. Reg. 18,656 (1985) (deleting 47 C.F.R. § 76.215).

346. Letter from Mark S. Fowler, Chairman, FCC, to Senator Helms (May 14, 1984) *reprinted in* 130 CONG. REC. 7321 (June 14, 1984) (statement of Sen. Helms); *see also* WGBH Educational Foundation, 69 F.C.C.2d 1250 (1978) (FCC rejects petition of anti-indecency group to deny license renewal to owner of station that broadcast programming which is allegedly "offensive, vulgar and . . . harmful to children").

347. Letter from Mark S. Fowler, *supra* note 346.

348. *Id.* In his May, 1984, letter to Senator Helms, Chairman Fowler acknowledged that "the Commission will impose sanctions where warranted [for violating a federal obscenity and indecency statute], *or will defer* to *local officials* or the Justice Department, as may be appropriate." *Id.* (emphasis added).

349. *Censorship Issue Tops Atlantic Show's "Great Debate"*, CableVision, Sept. 23, 1985, at 24.

C. *Cases Considering Preemption of State and Local Cable Indecency Regulations*

Because several provisions of the C.C.P.A. address the subject of the transmission of sexually explicit cable programming, opponents of state restrictions on cable indecency argue that state and local indecency regulations are preempted.[350] Were this argument to prevail, it could have a significant impact on the effectiveness and enforceability of cable indecency regulations, because, while state and local governments have aggressively enacted and enforced such regulations, the FCC has traditionally been reluctant to enforce restrictions of sexually explicit programming. Moreover, such a policy change would be inconsistent with the current trend toward deregulation in federal administrative agencies. However, the relevant case law indicates that preemption depends upon congressional intent, and the expression of congressional intent in the comprehensive C.C.P.A. clearly authorizes and encourages state and local indecency regulation.

1. *Crisp*

While only two federal courts[351] have directly considered the question of preemption of cable indecency regulations, the Supreme Court recently applied the preemption doctrine in a case dealing with another type of cable television regulation. In *Capital Cities Cable, Inc. v. Crisp*,[352] the Court unanimously held that Oklahoma's constitutional and statutory provisions which prohibited liquor advertising could not be applied to prevent in-state cable television systems from telecasting cable television programs originating from out-of-state which contained wine advertisements, because regulation of that aspect of cable television operations had been preempted by the FCC regulations.[353] Even though the lower courts had not considered preemption, the conflict between federal and local law was so apparent that the Court decided the case on that basis.[354]

The Supreme Court stated that federal regulations have no less preemptive effect than federal statutes, and that "[t]he power delegated to

350. *See, e.g.*, Shapiro, *First Amendment Considerations* in PRACTICING LAW INSTITUTE, (1985)—A PRACTICAL GUIDE TO THE CABLE COMMUNICATIONS POLICY ACT of 1984 at 137, 143. Mr. Shapiro has represented the cable networks or operators in suits challenging state or local indecency regulations.

351. *Wilkinson (I)*, 611 F. Supp. 1099 (D. Utah 1985) and *Wilkinson (II)*, 800 F.2d 989 (10th Cir. 1986); *see supra* text accompanying notes 119-148; *see also infra* text accompanying notes 366-78.

352. 104 S. Ct. 2694 (1984).

353. The Court also rejected Oklahoma's argument that the liquor advertising ban as applied to cable television and the importation of foreign broadcast signals was a valid exercise of state power under the twenty-first amendment. Acknowledging that the twenty-first amendment provides states with broad power to regulate the importation and use of liquor, the Court noted that the Oklahoma statute was merely an indirect regulation of the sale or use of liquor and that it directly conflicted with express federal policies. Thus, the state's interest was not of the same importance as the FCC's interest in fulfilling its statutory obligations. *Id.* at 2707-09.

354. *Id.* at 2699.

the FCC plainly comprises authority to regulate" television signals being rebroadcast over cable television systems if such regulation is necessary to achieve delegated responsibilities.[355] The Court determined that the Oklahoma prohibition of liquor advertisements originating in out-of-state television broadcasts retransmitted in-state over cable television would be preempted "if the FCC has resolved to pre-empt" that area of cable television regulation and if it was reasonably necessary to achieve FCC policies.[356]

The Court found irrefutable evidence of preemptive intent in, *inter alia*, the "deliberately structured dualism" adopted by the FCC allowing state and local authorities to regulate local incidents of cable operations, while maintaining FCC exclusive jurisdiction over all operational aspects.[357] Further evidence was found in the "must carry" rules of the commission which require cable operators to retransmit signals of broadcast television stations in specific geographic zones, including out-of-state stations located in those zones,[358] and in FCC rules prohibiting cable operations to alter or delete signals imported from out-of-state broadcast television stations.[359] Indeed, the unequivocal intent of the FCC to preempt state and local regulation of commercial advertising on cable television had been emphatically reiterated only one year earlier in an important published Commission opinion.[360]

The Court also found that the FCC preemption decision was reasonably necessary to achieve legitimate FCC policies. The Court noted that it would be "prohibitively burdensome" for Oklahoma cable operators to monitor each broadcast signal imported from out-of-state and delete every wine commercial before retransmitting the signal,[361] and that the commission had "retained exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards."[362]

Some commentators interpret the *Crisp* opinion to suggest that state and local regulation of indecent programming on cable television must also be superceded.[363] In sweeping terms, Justice Brennan's opinion referred to the cable industry's need for "breathing space . . . to expand vigorously and provide a diverse range of program offerings to potential cable subscribers,"[364] as well as to the FCC's preference for local

355. *Id.* at 2700 (quoting Fidelity Sav. and Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982)).

356. *Id.* at 2701.

357. *Id.* at 2702 (quoting Cable Television Report and Order, 36 F.C.C.2d at 207 (1972)).

358. *Id.* at 2703-04.

359. *Id.* at 2704.

360. Community Cable TV, Inc., 54 RAD. REG. 2d (P&F) 1351, 1359 n.20, (Nov. 15, 1983), *cited in Crisp*, 104 S. Ct. at 2704 n.11.

361. 104 S.Ct. at 2705.

362. *Id.* at 2702.

363. *See, e.g.*, Witt, *Cable Television Regulation After* Crisp*: Is There Anything Left?*, 17 URB. L. REV. 277, 293-97 (1985); Barbash, *High Court Limits State, Local Power in Cable Television*, Washington Post, June 19, 1984, at A1, col. 5.

364. 104 S. Ct. at 2705.

nonregulation of many aspects of cable television services.[365] The holding of the Court in *Crisp*, however, was very specific: the FCC clearly intended to preempt and, with congressional approval, clearly had preempted, state and local regulation of commercial advertising contained in broadcast signals imported for retransmission over local cable television. In fact, the emphasis in *Crisp* on the indisuputable evidence of the intent of Congress and the FCC to specifically preempt state regulation of commercial advertising in broadcast programs retransmitted by cable might suggest that similarly unequivocal evidence of preemptive intent must be shown before state regulation of indecent cable programming is deemed to be preempted.

2. *Wilkinson (I)* and *Wilkinson (II)*

The first court to consider the question whether state or local regulation of indecent cable programming is preempted by federal law was the federal district court in Utah. The preemption analysis of Judge Anderson began with a lengthy review of the *Crisp* decision, suggesting that *Crisp* would support a finding of preemption, but eventually acknowledging that "the Supreme Court did not explicitly consider whether state indecency regulations were preempted."[366] The court next turned its attention to the C.C.P.A. The district court reviewed selected provisions of the Act and found some evidence of intent to preempt state indecency regulations. First, the court noted that sections 611 and 612 provide specific methods of restricting indecent cable programming on public access or educational channels and precluding other types of regulation.[367] More importantly, however, the district court rejected Utah's argument that the cable indecency regulation was authorized by section 638 which explicitly preserves criminal and civil liability under "[f]ederal, [s]tate or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar

365. It is, of course, possible that Justice Brennan was subtly trying to lay the groundwork for a future holding that local regulation of indecent cable programming is preempted under his last-mentioned basis for federal preemption. Certainly the broad discussion of the cable industry's need for "breathing space" and of the federal policy to not interfere with the development of this new industry could be a useful entree to such a holding. But this part of the opinion is better read in context, with reference to the particular type of regulation before the Court. This discussion was knitted closely into the analysis of the specific state regulation being assessed in *Crisp*. It could be misleading to transpose that general discussion into a different regulatory context.

366. *Wilkinson (I)*, 611 F. Supp. at 1102.

367. Section 612(h) provides that, on "special access channels," cable services shall not be offered, or shall be provided subject to the condition that the service not transmit material "obscene . . . filthy or indecent or is otherwise unprotected by the Constitution." 47 U.S.C.A. § 532(h) (West Supp. 1986). The district court found the Utah law to be defective on two counts under this section: first, the Utah law applied to all channels, not just "special access channels;" second, the statute only authorized conditioning or forbidding cable service, not the regulation of specific programming itself. Thus, the district court concluded that section 612 expressly preempts "the Utah law with regard to these channels." 611 F. Supp at 1103. Similarly, the district court read section 611(e) which prohibits the exercise of editorial control on public education channels, as preempting the Utah indecency law as applied to those channels. *Id.*

laws. . . ."[368] The district court emphasized that "indecency" was not specifically mentioned in section 638. Since that term was used in other sections, the court declared "that Congress deliberately omitted indecency" from section 638 and thereby intended to preempt local regulation of indecency on cable television.[369] The court emphasized that " 'indecent' expression is not wholly unprotected speech," so it ought not to be read into the catch-all phrase "other similar laws."[370] Statements of members of Congress which indicated that the Act would not preempt state and local regulation were dismissed, because Representative Nielson's remarks were not officially transcribed and Senator Goldwater's remarks were inserted into the Congressional Record rather than spoken on the floor of the Senate.[371]

Nevertheless, the district court noted that the House Report suggested a congressional intent to link regulatory power with constitutional principle.[372] Thus, after strongly suggesting that Congress intended to preempt state and local regulation of indecent cable programming, the district court reached a different conclusion. Judge Anderson concluded that if the state regulations were unconstitutional under the first amendment, they were also preempted under the C.C.P.A.; presumably if they were not unconstitutional, they would not be preempted.

On appeal in *Wilkinson (II)*, the Court of Appeals for the Tenth Circuit summarily affirmed the district court's decision in a brief per curiam opinion. The Court of Appeals apparently read Judge Anderson's opinion as holding that Congress intended to preempt state regulation of nonobscene sexual cable programming,[373] and without any independent analysis affirmed the judgment of the lower court "on the basis of the reasons stated in the [district court] opinion."[374]

Judge Baldock, concurring specially in the judgment, explicitly disagreed with the conclusion that federal law preempts state regulation of sexually explicit cable programming which is not obscene. The C.C.P.A. prevents the states from imposing criminal or civil liability based on the content of programs transmitted on leased access or public, educational or governmental channels.[375] To that extent state regulation of indecency is partially preempted. However, even as to those channels, the Act authorizes state and local franchising authorities to regulate program content insofar as it is not protected by the Constitution.[376] And

368. 47 U.S.C.A. § 558 (West Supp. 1986).
369. 611 F. Supp. at 1104.
370. *Id.*
371. *Id.* at 1105.
372. *Id.*
373. *Id.*, n.2. This is one reason why Judge Baldock refused to subscribe to the per curiam opinion. Wilkinson (II), 800 F.2d at 992 (Baldock, J., concurring) ("I do not agree with *this* court's apparent conclusion that federal law preempts state regulation of sexually oriented content which is not obscene.") *Id.* (emphasis added).
374. *Wilkinson (II)*, 800 at 992.
375. 47 U.S.C. § 558 (Supp. III 1985).
376. 47 U.S.C. §§ 532(h), 544(d)(1) (Supp. III 1985).

as to all other cable channels, the Act explicitly preserves state and local authority to impose liability under laws regulating obscenity "or other similar laws."[377] The relevant House of Representatives Committee Report clearly reveals unequivocal congressional intent to allow state and local governments to regulate indecency if the courts hold such regulations constitutional. The committee was aware of uncertainty regarding the constitutionality of indecency regulations and intended to incorporate the evolving constitutional standards. The provision of the C.C.P.A. requiring lockboxes to be made available shows that Congress considered the use of lockboxes to be one way, but not the only way, to deal with the problem of indecent cable programming.[378]

The analysis of the preemption question in *Wilkinson (I)* is, regrettably, self-contradictory and erroneous. Although Judge Anderson began his preemption analysis with a clear understanding that the question was ultimately one of congressional intent, his opinion abandoned the search for congressional intent to engage in a rather superficial semantic exercise. In the end, however, the district court correctly concluded that the intent of Congress was to permit state regulation of indecency to the extent it is not prohibited by the first amendment. The preemption analysis of Judge Baldock is much more perceptive and coherent, but it failed to receive the endorsement of the other judges on the Tenth Circuit panel. Since the opinion in *Wilkinson (I),* which was endorsed by two judges in *Wilkinson (II),* does not do a very good job of analyzing the preemption question, and since most of the court's analysis seems to contradict the conclusion reached, the matter deserves clarification here.

D. *State and Local Regulation of Indecent Cable Programming is Statutorily Authorized, Not Preempted, by the Cable Communications Policy Act of 1984*

The supremacy clause of the Constitution[379] establishes the preeminence of all federal laws enacted pursuant to the constitutional scheme of specifically allocated federal powers. When a state law conflicts with a valid federal law, the state law is preempted and superseded by the superior federal law. When federal preemption is claimed to result from the exercise of a power granted to Congress, the question is one of congressional intent and the court's responsibility is to discern whether Congress intended to preempt state law.[380]

Earlier in this century, the Supreme Court was willing to liberally infer congressional intent to preempt state legislation which impeded in any way the furtherance of federal policies that it favored.[381] This approach has been tempered in recent years by judicial reluctance to pre-

377. 47 U.S.C. § 558 (Supp. III 1985).
378. *Wilkinson (II)*, 800 F.2d at 992-995 (Baldock, J., concurring).
379. U.S. CONST. art. VI, cl. 2.
380. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 292, 293 (2d. ed. 1983).
381. *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); Hines v. Davidowitz, 312 U.S. 52 (1941).

sume or infer intent to preempt state laws in the absence of clear evidence of congressional purpose to supersede.[382] In *Crisp*,[383] Justice Brennan summarized the "familiar and well-established" doctrine of preemption. Federal preemption of state regulation may be found in three circumstances: (1) when Congress has "expressed a clear intent to preempt state law;" (2) when federal legislation so comprehensively regulates the field that " 'no room for the states to supplement' federal law" remains; or (3) when compliance with both federal and state law is impossible or compliance with state law would effectively frustrate achievement of the full objectives of Congress.[384] Thus, in the face of clear congressional intent to preempt, a judicial finding of preemption is impermissible.

Four months after the Supreme Court decided *Crisp*, Congress passed the Cable Communications Policy Act of 1984.[385] The C.C.P.A. is the only comprehensive regulatory statute for the cable television industry that has been enacted by Congress. Its language and history provide dispositive evidence of congressional intent regarding preemption of state and local regulation of indecent cable programming.[386] Because the question of preemption of local and cable regulation of sexually explicit programming is specifically addressed in the text of the C.C.P.A. and was discussed in Congress during the passage of the Act, resolution of the preemption question must be determined under the first standard summarized in *Crisp*, as set forth above.[387] Both the Act and the legislative history evidence a clear congressional intent *not* to preempt state and local regulation of indecent cable programming.

The C.C.P.A. contains a general declaration of congressional intent to preempt conflicting state or local regulation of cable television. Section 636(c) of the Act provides that state and local laws or franchise restrictions which are inconsistant with the Act are "preempted and

382. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978); New York State Dept. of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973); Goldstein v. California, 412 U.S. 546 (1973).

383. 104 S. Ct. at 2700.

384. *Id.*; *see also* Hillsborough County v. Automated Medical Laboratories, 105 S. Ct. 2371, 2375 (1985).

385. The Senate version of this cable television deregulation bill, sponsored by the National Cable Television Association, S. 66, passed on June 14, 1983. *See generally Phone Rate Policy is Added Before Senate OKs Cable Bill*, 41 CONG. Q. WEEKLY REP. 1237 (1983); *Cities, Cable Operators Reach Agreement*, 41 CONG. Q. WEEKLY REP. 637 (1983); *Cities Divided Over Measure Curbing Regulation of Cable*, 41 CONG. Q. WEEKLY REP. 845 (1983); 41 CONG. Q. WEEKLY REP. 1885, 2270 (1983). The House version, H.R. 4103, passed on October 1, 1984. 1984 U.S. CODE CONG. & ADMIN. NEWS 4655. A compromise version, the Cable Communications Policy Act of 1984, passed both houses of Congress on October 11, 1984, and was signed into law by the President on October 30, 1984. 47 U.S.C. § 521-59 (West Supp. 1985).

386. *See Wilkinson (I)*, 611 F. Supp. at 1102.

387. If an intent *not* to preempt is clearly expressed by Congress in the text or legislative history of an Act, the courts are not free to declare that state laws are, nonetheless, superceded by the creative application of constructive intent under one of the other tests described by Justice Brennan.

superceded."[388] Congress also explicitly prohibited federal, state and local authorities from imposing regulations "regarding the provision or content of cable services *except as expressly provided*" in the Act.[389]

It is also clear that Congress was concerned about the transmission of sexually explicit indecent programming over cable television. "In order to restrict the viewing of programming which is obscene or indecent," section 624(d)(2)(a) requires cable operators to make lockboxes available.[390] Section 639 makes it a crime to transmit obscene or otherwise unprotected material over cable television systems.[391] While regulation of content or editorial control of public, educational and governmental channels is generally prohibited,[392] Section 614(d)(1) of the Act specifically authorizes state and local agencies to prohibit or regulate cable services "if such cable services are obscene or otherwise unprotected by the Constitution of the United States."[393] Likewise, while cable operators are generally immune from liability for programs shown on designated commercial access channels,[394] section 612(h) prohibits or authorizes state and local government to regulate programming on such channels which "is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or *indecent* or is otherwise unprotected by the Constitution of the United States."[395]

Aware of the potentially preemptive consequences of the enactment of a broad regulatory scheme and of the provisions regulating indecent programming on cable television, however, Congress inserted two provisions in the C.C.P.A. intended to preserve local regulation of sexually explicit cable television programming. Section 624(d)(1) of the Act provides:

> Nothing in this title shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise agreement or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are *obscene or are otherwise unprotected by the United States Constitution.*[396]

Also, section 638 of the Act, specifically preserves the authority of state and local lawmakers to enforce obscenity and similar laws:

> Nothing in this title shall be deemed to affect the criminal or civil liability of channel programmers or cable operators pursuant to the *Federal, State* or *local* law of libel, slander, obscenity,

388. Cable Communications Policy Act § 636(c), 47 U.S.C. § 556(c) (West Supp. 1985).

389. Cable Communications Policy Act § 624(f)(1), 47 U.S.C. § 544(f)(1) (West Supp. 1985) (emphasis added). As noted earlier, however, regulations of indecent forms of expression ought not to be considered regulations of cable "content."

390. *See supra* note 344 and accompanying text.

391. *See supra* note 343 and accompanying text.

392. Cable Communications Policy Act of 1984 § 611(e), 47 U.S.C. § 531(e) (Supp. III 1985); *see also* C.C.P.A. § 638, 47 U.S.C. § 558.

393. C.C.P.A., § 624(d)(1), 47 U.S.C. § 544(d)(1) (Supp. III 1985).

394. C.C.P.A., § 638, 47 U.S.C. § 558 (Supp. III 1985).

395. C.C.P.A., § 612(h), 47 U.S.C. § 532(h) (Supp. III 1985) (emphasis added).

396. C.C.P.A., § 624(d)(1), 47 U.S.C.A. § 544(d)(1) (Supp. III 1985) (emphasis added).

> incitement, invasions of privacy, false or misleading advertising, *or other similar laws*, except that cable operators shall not incur such liability for any program carried on any public, educational, governmental use, or on any other channel under section 612 [public access channels] or under similar arrangements.[397]

Since neither of these sections specifically mentions state or local authority to regulate *indecency*, the critical question is whether Congress intended indecency regulations to be included by use of the broader, categorical terms preserving state and local regulation of material that is "obscene or otherwise unprotected" and preserving state and local laws restricting "obscenity . . . or similar laws."[398]

In *Wilkinson (I)*, Judge Anderson concluded that Congress did not intend to include indecency regulations, "because 'indecent' expression is not wholly unprotected speech."[399] While the conclusion that indecency is not "wholly unprotected" by the Constitution is not bad as first amendment theory, it is erroneous as a finding of fact regarding congressional intent. In section 612(h), the drafters of the C.C.P.A. explicitly included indecent material in the list of examples of material which they described as "unprotected by the Constitution of the United States."[400] Moreover, in the very next subsection after the drafters referred generally to materials that are "obscene or are otherwise unprotected by the United States Constitution," they referred specifically to materials that are "obscene or indecent."[401] Thus, the text of the C.C.P.A. reveals congressional understanding that "indecent" cable programming was "unprotected" by the Constitution and "similar" to obscenity.

Both the House and Senate Reports also provide unequivocal evidence that Congress intended not to preempt state and local regulation of indecent cable programming. The Senate Report noted that the proposed Act "continues to give local governments the authority *over local areas of concern and authorizes them to protect local needs*."[402] Concerning the predecessor of section 624(d)(1) the Senate Report notes:

> Lastly, section 607 [the Senate version counterpart of § 624] makes it clear that this bill does not preclude or prohibit franchising authorities and cable operators from specifying, in a franchise agreement or renewal thereof, that certain cable services shall not be provided, or shall be provided subject to conditions, if such cable services are obscene or otherwise unprotected by the U.S. Constitution. The standards for making

397. *Id.* at § 638, 47 U.S.C.A. § 558 (West Supp. 1985) (emphasis added).

398. The omission of the term "indecent" is not conclusive because the terms that were used are facially even broader and more inclusive. The intent of the draftsmen was to use a catch-all phrase rather than to attempt to specify each and every particular type of speech that could be regulated.

399. 611 F. Supp. at 1104.

400. *See supra* note 313 and accompanying text. *See also* C.C.P.A., § 624(d)(2)(A), 47 U.S.C.A. § 544(d)(2)(A) (West Supp. 1985).

401. C.C.P.A. § 624(d)(2)(A), 47 U.S.C. § 544(d)(2)(A) (West Supp. 1985).

402. S. REP. No. 67, 98th Cong., 1st Sess. 11 (emphasis added).

> such determinations are established and applied by the courts . . . . This section would apply to future U.S. Supreme Court decisions which may find that other kinds of speech are unprotected under the Constitution.[403]

The House Report concerning section 624(d)(1) likewise reveals that the draftsmen intended that state and local authorities would continue to be empowered to go as far as the courts would permit them to go under the first amendment to regulate sexually explicit material. The drafters of the House Report noted that the Supreme Court had ruled that regulation of indecent radio programming was not prohibited by the first amendment, but that several lower courts had ruled that regulation of indecent cable programming was impermissible.[404] Nevertheless, the drafters of the House Report noted:

> The provision covers not only obscene speech, but other speech which may also be unprotected by the Constitution of the United States. This provision would also permit change in constitutional interpretations to be incorporated into the standard set forth in 624(d)(1), *should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable.*[405]

Finally, two formal statements by the Chairman of the relevant House Committee and by the Chairman of the relevant Senate Subcommittee[406] unequivocally establish that Congress intended not to preempt state and local regulation of indecent cable programming. When H.R. 4103, the House counterpart of S. 66, came before the House Committee on Energy and Commerce for markup in late June of 1984, there was a significant undercurrent of concern about protecting the rights of state and local governments to prohibit indecent and obscene cable programming. The same day the Dannemeyer and Bliley amendments were introduced,[407] Congressman Howard Nielson and Chairman John Dingell engaged in a formal colloquy to clarify the legislative intent behind section 639 which became section 638 of the Act and section 624(d) that state and local regulation of indecent cable programming would continue to be allowed "if constitutionally permitted."

> *Cong. Nielson*: I would also like to clarify that laws regulating indecency are included under section 639, through the use of the phrase "other similar laws," as long as these laws are constitutional.
>
> *Chairman Dingell*: Yes. Indecency is similar to obscenity, and thus would be included.

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403. S. REP. No. 67, 98th Cong., 1st Sess. 11. It was the Senate version of the bill that was passed in lieu of the House bill after compromise amendments had been adopted. 1984 U.S. CODE CONG. & AD. NEWS4655.

404. H.R. REP. No. 934, 98th Cong., at 69, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4706 (emphasis added).

405. *Id.* (emphasis added). *See also Wilkinson (I)*, 611 F. Supp. at 1105.

406. Both congressmen represented their respective houses in the Conference Committee which put together the C.C.P.A. 130 CONG. REC. 14,281-89, (Oct. 11, 1985).

407. *See supra* notes 342 and 343 and accompanying text.

> *Cong. Nielson*: I note that under section 624(d), a franchising authority can specify that certain cable services shall not be provided if they are obscene or are otherwise unprotected by the U.S. Constitution. I feel strongly that *local authorities should have authority to prohibit such programming*. I assume that, to the extent that *programming which is indecent is not constitutionally protected, it could also be subject to such agreements*.
>
> *Chairman Dingell*: Restrictions on indecent programming have been upheld by the Supreme Court in a broadcast context. In *FCC v. Pacifica Foundation*, the court said that indecency could be regulated. For example, it could be restricted to certain times of day, in order to protect children. *Such restrictions on indecency, if constitutionally permitted, are not prohibited by this bill.*[408]

Another crucial colloquy took place in the Senate on October 11, 1984, the day the Cable Communications Policy Act of 1984 was voted on and passed in both houses of Congress. Senator Goldwater, the Chairman of the Communications Subcommittee of the Senate Commerce Committee, the sponsor of S. 66, and one of the Senate conferees, clarified the understanding of the conferees that section 638 of the Act preserved and did not preempt state and local regulation of obscene or indecent cable programming.

> *Mr. Trible.* I am particularly concerned about a recent Supreme Court decision regarding the question of FCC preemption. In Capital Cities Cable, Inc., et. al. against Crisp, Director, Oklahoma Alcoholic Beverage Control Board, the Court held that conflicting State regulations are precluded when the FCC resolves to preempt an area of cable television regulation . . . .
>
> Although the Court did not specifically address the *questions of obscenity and indecency*, that case is already being cited by plaintiffs attempting to over turn a Utah statute regulating cable television content. *Is section 638 addressed directly to the Supreme Court's decision in Capital Cities?*
>
> *Mr. Goldwater. Yes, it is and that is the understanding of the conferees.* Section 638 makes clear that nothing in this measure is to be interpreted as granting exclusive authority for regulating cable television content to the FCC. Rather, *States and localities retain any authority which they would have in this area* if the Communications Act of 1934 had never been enacted.
>
> *Mr. Trible.* I also wish to ask whether section 638 applies to

408. Colloquy between Congressman Nielson and Chairman Dingell before the Committee on Energy and Commerce, June 26, 1984 (emphasis added) (copy of transcript in author's possession). *See also* Thone, *Energy and Commerce Committee Move to Control Cable TV Content*, The Daily Herald (Provo, Utah), June 28, 1984, at 19, col. 1; Del Porto, *Measure Could Free Way for Local Cable Restrictions*, Desert News (Salt Lake City, Utah), June 28, 1984, at 12A, col. 1. At the time this colloquy took place, the relevant sections of both the Senate bill and the House version provided: "Nothing in this title shall be deemed to affect the criminal or civil liability of channel programmers or cable operators pursuant to *the law* of libel, slander, obscenity, [etc.]." S. 66, 98th Cong., 1st Sess. § 612 (1983); H.R. 4103, 98th Cong., 2d Sess., § 642 (1983) (emphasis added). But the Act as passed, apparently reflecting concern, contained the additional words, "Federal, *State* or *local*" between "the" and "law" in the text just quoted. C.C.P.A. § 638, 47 U.S.C.A. § 558 (West Supp. 1985).

> Federal, State, and local laws dealing with *indecency in cable television*?
> *Mr. Goldwater.* Yes, it does and that is the understanding of the conferees. *Indecency laws are related to laws prohibiting obscenity, and thus would be covered by the phrase from section 638: "and other similar laws." Under this section, Federal, State, and local laws regulating indecency on cable would be preserved.* Restrictions on indecent programming in a broadcast context have been upheld by the Supreme Court. For example, the Supreme Court said in FCC against Pacifica Foundation that indecent speech on radio could be restricted to certain times of the day in order to protect children. *Such restrictions on indecency—if otherwise constitutionally permissible —would not be preempted by this legislation or other provisions of the Communications Act.*[409]

This colloquy was adopted by the conferees as expressing their understanding and intent.[410] Thus, Congress *clearly* intended *not* to preempt state and local regulation of indecent cable television programming.

E. *Attempted Federal Preemption of State and Local Indecency Regulations Would Raise Serious Constitutional Questions*

Finally, it is questionable whether Congress constitutionally could preempt all regulation of indecency by state and local authorities. Just as the supremacy clause establishes the preeminence of federal law in the areas of regulation assigned by the Constitution to the federal government, the ninth and tenth amendments establish the preeminence of state and local law in the reserved areas of local concern.[411] If state and local regulations of indecency "would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation" then "the Constitution requires that the state rule prevail, even in the face of a conflicting federal rule."[412] Awareness of the constitutional problems which could be created by federal preemption of matters left by the Constitution to the states for local regula-

409. 130 CONG. REC. 14,288 (Oct. 11, 1984) (emphasis added); *see also id.* at 14,285.

410. 130 CONG. REC. 14,288 (Oct. 11, 1984); *see also id.* at 14,285.

411. *See, e.g.*, Erie Railroad Co. v. Tompkins, 304 U.S. 64, 77-79 (1938); The Federalist No. 39 (J. Madison) p. 256 (J. Cooke ed. 1961) ("[L]ocal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the [national] authority than the [national] authority is subject to them in its own sphere." *Id.*

412. Hannah v. Plummer, 380 U.S. 460, 475 (1965), (Harlan, J., concurring). Justice Harlan explained the significance of the *Erie* decision in terms of constitutionally mandated federalism:

> I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs. And it recognized that the scheme of our Constitution invisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.

Id. at 474, 475.

tion may be one reason why the Supreme Court has shown extraordinary caution in applying the doctrine of preemption to state laws regulating domestic relations.[413] Thus, preemption is not just a one-way, pro-federal doctrine; it is a rule of "respect for the separate spheres of governmental authority preserved in our federalist system."[414]

The interests which "indecency regulations" are designed to protect are interests primarily entrusted to the states to regulate, not to the federal government.[415] The United States is a nation of pluralities. States and local communities are much closer to their constituencies and much more accurately reflect the local sensitivities than does the federal government. Regulations designed to protect standards relating to sexual indecency are more manageable at the state or local level than at the national level.[416] At the national level some voices speaking on appropriate sexual programming could not be adequately represented or would be ignored. These voices would have a more representative influence at the state and local level.[417] Local regulations of cable television programming may withstand constitutional scrutiny even if similar regulations adopted by the federal government would not.[418]

In recent years the interpretation of the tenth amendment has been inconsistent.[419] However, under any substantial interpretation of the meaning of the tenth amendment,[420] the reasons for deference to local

413. The Court has held that it will not find federal preemption of state domestic relations laws, unless it is shown that they do "major damage" to "clear and substantial" federal interests. McCarthy v. McCarthy, 453 U.S. 210, 220 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); *see also* Sosnma v. Iowa, 419 U.S. 393, 404 (1975); Ohio ex rel Popovich v. Agler, 280 U.S. 379, 383 (1930); Simms v. Simms, 175 U.S. 162, 167 (1899); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858).

414. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981).

415. *See* Roth v. United States, 354 U.S. 476, 504 (1957) (Harlan, J., dissenting). Thus, a national commission investigating pornography recently noted "that in our federal system primary responsibility for law enforcement has always been with the states. The police power of the states has commonly been taken to include primary responsibility for dealing with the very types of harms at which the obscenity laws are directed." 1 Attorney General's Commission on Pornography, Final Report 374 (1986).

416. *See generally* Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 DRAKE L. REV. 391 (1978). Cable television regulation "ultimately functions at its best when specifically designed to meet local conditions and needs." *Id.* at 418.

417. This could justify deference to state sovereignty even under the restrictive dicta of Justice Blackmun's opinion for the Court in Garcia v. San Antonio Metropolitan Transit Auth., 105 U.S. 1005, 1018 (1985). *See generally* Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J.723, 35-43 (1984).

418. *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976).

419. *See generally* Harrison, *Access And Pay Cable Rates: Off-Limits to Regulators After Mid-West Video II?*, 16 COLUM. J. & SOC. PROBS. 591, 645 (1981).

420. It might be that federalism suggests not a division of power, but a division of function. *See* S. DAVIS, THE FEDERAL PRINCIPLE 143, 186 (1978). On a functional basis, implementation and protection of community values regarding when and how limits upon the transmission of sexually explicit programming into homes over systems requiring the use of community resources would be for local, not national, regulation. *See also* Nagel, *Federalism as a Fundamental Value*, 1981 SUP. CRT. REV.101-09; *Garcia*, 105 S. Ct. at 1028-29 (Powell, J., dissenting) (reviewing history of adoption of tenth amendment and intent of the framers that the states retain power to regulate matters of local, everyday concern).

regulation of sexually explicit indecent cable programming could be even more compelling.[421] Thus, the tenth amendment could be interpreted as requiring that local laws which further state interests may not be preempted by inconsistent federal laws.

CONCLUSION

The constitutionality of laws regulating the transmission of sexually explicit "indecent" programming over cable television is a matter of far-reaching significance. The federal courts which have directly addressed this issue have uniformly invalidated state and local laws restricting indecent programming on cable television. Legal commentators have generally endorsed that result. The courts, however, have erroneously refused to apply the *Pacifica* doctrine in assessing the constitutionality of cable indecency regulations.

Applying first amendment analysis, the intrusiveness of the regulated communication must be assessed and weighed against the intrusiveness of the challenged regulation. Sexually explicit cable programming is intrusive, because it invades the privacy of the home, because cable television viewers have no control over the programming, because of the accessibility of cable television to children, because the medium monopolizes public resources which could be dedicated to programming suitable for the entire community, and because of the vulgarity of the manner of expression.

Insofar as cable television is analytically similar to broadcast television and since it involves private exploitation of the public domain, some regulation of cable television programming is constitutionally permissible. Whether any particular cable TV indecency regulation is permissible or not depends upon the type of regulation and the context of enforcement. Assessing the balance of harm to protected interests, criminal laws banning all nonobscene, but sexually explicit programming from all cable channels probably are not justifiable. Reasonable regulations which require cablecasters to "channel" or segregate the time or manner of presenting sexually explicit material are justifiable. Regulations which merely shift the cost or burden of taking the initiative from persons who do not want to have sexually explicit programming intrude into their home via cable television to persons who want to have access to sexually explicit programming by means of cable television are justifiable under this analysis, because they provide a better remedy for the real but often intangible injuries which individuals suffer when undesired, sexually explicit, indecent matter intrudes into their lives and when they are excluded from full access to mass media.

Finally, Congress and several states have enacted laws designed to

421. The four dissenters in *Garcia* all predicted that the *de minimus* content of the tenth amendment suggested in the majority opinion would not be the final word on the subject. 105 S. Ct. at 1021 (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.); *id.* at 1033 (Rehnquist, J., dissenting); *id.* at 1033 (O'Connor, J., dissenting, joined by Powell and Rehnquist, JJ.).

protect the public from the uninvited intrusion of sexually explicit cable television programming. Federal laws do not preempt state laws regulating indecency. The Cable Communications Policy Act of 1984 explicitly reserves the power of state and local governments to regulate and restrict sexually explicit material to the extent permitted under the Constitution. The scope of authority for state and local governments to regulate sexually explicit material under the preemption doctrine is determined under the first amendment: if a cable indecency regulation is constitutional it is not preempted. If Congress had attempted to preempt state and local indecency laws, it would have triggered serious constitutional questions regarding the balance of powers inherent in our federal system.

THE CITY OF CLEBURNE V. CLEBURNE LIVING CENTER AND THE SUPREME COURT: TWO MINORITIES MOVE TOWARD ACCEPTANCE

I. INTRODUCTION

The plight of this nation's mentally retarded citizens was brought to the fore recently by the United States Supreme Court in the case of *City of Cleburne v. Cleburne Living Center*.[1] On its face, *Cleburne* is simply the Court's affirmation of a renewed societal awareness of one of the forgotten minorities in the United States, and the next logical step in a judicial process which guarantees that this group will have an adequate and fair opportunity to assimilate into the mainstream of our culture.[2] However, the case indicates a noticeable shift in the undercurrent of judicial interpretation practiced by the Burger court. More specifically, the traditional method of judicial review is perhaps being supplanted by a newer model of equal protection analysis.

This Comment will highlight the growing dissatisfaction with the inconsistency and rigidity of the traditional standard of review, and will probe the *Cleburne* decision in order to gain valuable insight into both the direction of the Court and the future of the equal protection doctrine. Particular attention will be focused on the concurring opinion of Justice Stevens, an individual who shows increasing signs of leadership on a Court which lacks direction.

II. THE EQUAL PROTECTION DOCTRINE — AN OVERVIEW

A. *Historical Background*

> *Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.*
>
> Aristotle[3]

To say that equal protection has undergone a significant metamorphosis in the course of the Twentieth Century would certainly be an understatement. From its humble origins in the fourteenth amendment,[4] as the most deferential form of judicial scrutiny[5] focusing merely

1. 105 S. Ct. 3249 (1985).

2. Professionals within the area of mental retardation have developed the concept of "normalization" to define the goal and process of helping retarded citizens lead a "normal" life. Achievement of this goal involves undoing the multitude of formal restrictions placed on retarded citizens, such as, restrictions on residence, education, and the right to marry. *See* Chambers, *The Principle of the Least Restrictive Alternative: The Constitutional Issues*, in THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 486-487 (1976).

3. ARISTOTLE, ETHICA EUDEMIA VII § 1241(b) (W. Ross ed. 1925).

4. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. Justice Holmes noted that equal protection was "the usual last resort of constitutional arguments . . . . " Buck v. Bell, 274 U.S. 200, 208 (1927).

on legislative means,[6] the equal protection clause was transformed during the Warren era and particularly in the political and intellectual explosiveness of the 1960's. Equal protection literally became a symbol for combatting unjust governmental classifications of persons. While the Supreme Court did not dispose of the minimal standard of review, it developed a much stronger level of scrutiny to delve into the social inequalities that plagued the American culture, most notably, racial discrimination.[7] Additionally, the advent of "new" equal protection required a closer relationship between the legislative classification and its purpose — careful scrutiny of the goals of the particular legislation.[8]

"New" equal protection, strict scrutiny under the Warren Court, developed into strands. First, strict scrutiny would be appropriate where a legislative classification burdened "a fundamental right or interest."[9] Second, a more intensive review was applied where the presence of a "suspect classification" necessitated intervention into inequities in governmental categorization of a group of persons.[10]

Although the legacy of "new" equal protection under the Warren Court passed to its successor, the Burger Court has been reluctant to adopt the spirit of hope and anticipation which permeated the Warren Court. In fact, the Burger Court has taken a "thus far and no further" stance with regard to equal protection.[11] Although the Supreme Court still adheres to the traditional model, it has not been as loyal to the bifurcated system as it may have envisioned. For instance, the Court today utilizes a three-tiered approach, having inserted a middle tier of heightened or intermediate scrutiny.[12] This intermediate level of scrutiny has

6. G. GUNTHER, CONSTITUTIONAL LAW 670 (10th ed. 1980). Professor Gunther cites Railway Express Agency v. New York, 336 U.S. 106 (1949) (Jackson, J., concurring) ("[I]nvocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact."), as indicative of the fact that "old" equal protection emphasized only the rationality of classifications, not the objectives of the legislature.

7. Thus the Warren Court adhered to a rigid "two-tiered" model of review: the "older" rational basis test, or deferential standard of review; and strict scrutiny, the aggressive brand of review. Borrowing a phrase from Professor Gunther, strict scrutiny was " 'strict' in theory and fatal in fact; whereas old equal protection used " 'minimal' scrutiny in theory and virtually none in fact." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

8. GUNTHER, *supra* note 6, at 671.

9. Fundamental rights or interests protected by the Court include: Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (the political franchise of voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (freedom of interstate migration); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Douglas v. California, 372 U.S. 353 (1963) (the right to criminal appeals).

10. Suspect classifications triggering strict scrutiny are limited to race, Loving v. Virginia, 388 U.S. 1 (1967); ancestry or national origin, Korematsu v. United States, 323 U.S. 214 (1944); and alienage, Graham v. Richardson, 403 U.S. 365 (1971) (resident aliens could not be denied welfare benefits). One should note however that the Court's scrutinization of alienage classifications has wavered in recent years, especially where governmental functions are involved. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978).

11. GUNTHER, *supra* note 6, at 672.

12. Of critical importance in this commentary are the limitations imposed on the equal protection clause by the Burger Court. Therefore, it may be prudent to identify the adjectival phraseology which distinguishes the three levels of scrutiny. Strict scrutiny is the most intense level of review, requiring that a classification be necessary to achieve a

clearly affected classifications based upon gender,[13] alienage,[14] and illegitimacy.[15]

Another significant change under the Burger Court is a new perspective on the "old" equal protection standard. Where social and economic legislation had been perfunctorily sustained under "old" equal protection, the Burger Court has been increasingly willing to invalidate legislation using the supposedly deferential rational basis test, in what has been termed new "bite" for the "traditionally toothless minimal scrutiny standard."[16]

Therefore, equal protection clearly is no longer "a last resort of constitutional arguments," but has developed into a concept overshadowing the express language of the fourteenth amendment. Therein lies the source of the doctrinal confusion which pervades the Court's equal protection analysis. The Supreme Court, in essence, created an ideal which may be reflected only in specific instances before the Court. Thus, the Burger Court is left to examine each problem confronting a disadvantaged class on a case by case method.

B. *Growing Discontent With the Present Status of Equal Protection*

While the Warren Court ushered in a new age of equal protection analysis, the transition was not completely welcomed into the arms of jurisprudential thought. True, the emergence of the intermediate level of scrutiny seemed to pacify some critics of the bifurcated model; however, the result of the middle tier of review has been merely to create an interventionist tool for making so-called "just" decisions without extending the analysis beyond the importance of the personal interest or the value of the legislative end.[17] Therefore, equal protection has come under attack from various groups and, as a result, has led to further factionalization on the Court and a corresponding reduction in deliberation.[18]

Justice Marshall figures most prominently in the mounting dissatisfaction with the multi-tiered system of review. In a series of dissenting opinions beginning in 1970,[19] Justice Marshall has called for a reexami-

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compelling governmental interest. Dunn v. Blumstein, 405 U.S. 330, 342 (1972). Middle-level scrutiny demands that the means chosen by the state must be substantially related to achievement of an important governmental objective or end. Craig v. Boren, 429 U.S. 190, 197 (1976). Finally, the rational basis test is the most deferential and relaxed standard, whereby the Court will uphold any classification rationally related to an articulated legitimate state interest. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

13. *See* Craig v. Boren, 429 U.S. 190 (1976).

14. *See* Plyler v. Doe, 457 U.S. 202 (1982) (illegal aliens).

15. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

16. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972). *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

17. Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 Mo. L. REV. 587, 616 (1983).

18. *Id.* at 615.

19. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Mar-

nation of the Warren Court model, with its Burger Court modifications,[20] and reformulation of an appropriate method of review. He has suggested a "sliding scale" analysis, whereby the level of scrutiny would be adjusted along a multifactored spectrum depending on the invidiousness of the governmental classification, the "relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive," and the strength of the interests asserted by the state in defense of the classification.[21] In *Chicago Police Department v. Mosley*,[22] Justice Marshall proposed a single standard which consolidated the tiers of review into one question appropriate in all equal protection cases; that is, is there "an appropriate governmental interest suitably furthered by the differential treatment?"[23] One need only look to the Court's subsequent refinement of the intermediate standard to determine the less than enthusiastic response of the Court toward Justice Marshall's opinion in *Mosley*.

A number of Justices, including those outside Justice Marshall's liberal bloc, have also shown their dissatisfaction with the multi-tiered approach. Justice Rehnquist, dissenting in *Craig v. Boren*,[24] the first case to articulate the intermediate level of scrutiny, opposed heightened scrutiny on the literalist ground that "the Equal Protection Clause contains no such language, and none of our previous cases adopt that standard."[25] Moreover, Justice Rehnquist observed that the Court has "had enough difficulty with the two standards of review . . . to counsel weightily against the insertion of still another 'standard' between those two."[26]

Justice Stevens, writing a concurring opinion in *Craig v. Boren*, argued for a single standard of review for, after all, there "is only one Equal Protection Clause."[27] Responding to Justice Rehnquist's adherence to the two-tiered approach, Justice Stevens commented that "whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard."[28] Justice Stevens, sounding much like Justice Marshall, was inclined to believe that equal protection analysis "does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that apply a single standard in a reasonably consistent fashion."[29]

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shall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

20. Even with the addition of a third level of review, Justice Marshall remains critical of the present system of equal protection review. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring).

21. Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

22. 408 U.S. 92 (1972).

23. *Id.* at 95.

24. 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting).

25. *Id.* at 220 (Rehnquist, J., dissenting).

26. *Id.* at 220-21 (Rehnquist, J., dissenting).

27. *Id.* at 211 (Stevens, J., concurring).

28. *Id.* at 212 (Stevens, J., concurring).

29. *Id.*

Perhaps the most compelling evidence of the Court's discontent with the multi-level approach is its frequent departure from it. The Court implements several means for achieving this result. First, the Court may vary the strength of the tests used to review the law.[30] For example, the Court may upgrade minimal scrutiny or downgrade intermediate scrutiny to either invalidate or uphold governmental objectives, respectively.[31] Second, the Court has been known to create exceptions to strict scrutiny through judicial sophistry in order to bypass a heightened standard of review.[32] For example, although the Court has accorded special constitutional protection to aliens through use of strict scrutiny, it has recently exempted alienage classifications from the most intensive review when they relate to matters "firmly within a state's constitutional prerogatives."[33]

III. *CITY OF CLEBURNE V. CLEBURNE LIVING CENTER*

A. *Factual Background and the Lower Courts' Response*

The genesis of this decision was a zoning dispute in which the City of Cleburne, Texas, pursuant to its comprehensive zoning ordinance,[34]

30. The Court utilizes various techniques for altering the standard of review. First, the less drastic means or least restrictive alternatives theory requires that the legislature impose restrictions that result in the least intrusion upon individual rights. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Trimble v. Gordon, 430 U.S. 762, 770 (1977). Second, the actual state interest theory requires the legislature to show an actual justification for imposition of a restriction. Therefore, the Court will not accept rationalizations concocted solely for litigation purposes, *see, e.g.*, McGinnis v. Royster, 410 U.S. 263, 270 (1973); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Third, rational basis testing counters the actual state interest theory in that it involves hypothesizing by the Court, hence the Court may accept any rationalization which conceivably justifies a challenged law. *See, e.g.*, Dandridge v. Williams, 307 U.S. 471, 485 (1970). Last, the Court may incorporate "deed-intent translocation" to repair constitutional peculiarities in legislation which causes unintended violations of equal protection. Comment, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 432-34 n.213 (1983); *see, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981).

31. *See* Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 166-69 (1984). Professor Shaman cites United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) and Zobel v. Williams, 457 U.S. 55 (1982) as examples of the Court's technique of upgrading minimal scrutiny. The Court critically examines governmental objectives, i.e., rejects the legitimate purpose, in order to invalidate the legislation. Alternatively, the Court may not grant wide latitude to governmental means, thereby striking down legislation using minimal scrutiny. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Furthermore, the Court has taken at least one occasion to downgrade intermediate scrutiny in order to sustain a classification usually deserving a heightened level of scrutiny. Thus, in Michael M. v. Superior Court, 450 U.S. 464, 468 (1981), Justice Rehnquist's plurality opinion succeeded in upholding a gender-based classification which made only males criminally liable for statutory rape by reducing intermediate scrutiny to a level "somewhat" sharper than the rational basis standard.

32. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 170-72 (1984).

33. *Id.* at 172. *See* Foley v. Connelie, 435 U.S. 291, 296 (1978) (quoting Sugarman v. Dugare, 413 U.S. 634, 648 (1973)).

34. Under Section 8 of the ordinance, the following uses are permitted in a district zoned R-3, the district in which the Featherston Street home is situated: any use permitted in District R-2; apartment houses or multiple dwellings; boarding and lodging houses; fraternity or sorority houses and dormitories; apartment hotels; hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble

required Jan Hannah, owner of the house and lot located at 201 Featherston Street in Cleburne, to obtain a special use permit for operation of the house as a group home for the mentally retarded.[35] Hannah, acting on behalf of Cleburne Living Center (CLC), purchased the building in July, 1980, with the express intention of establishing and operating a group home for thirteen mentally retarded adults in the moderate to mild range of retardation.[36] On July 28, 1980, Hannah applied to the City for the special use permit, but on August 18, 1980, the City's Planning and Zoning Commission voted to deny the permit. The City Council, at a public hearing concerning the permit application, denied the permit by a vote of three to one.[37]

CLC and Hannah brought suit in the United States District Court for the Northern District of Texas against the City, alleging equal protection violations committed against them and potential residents of the home. The district court found that the availability of group homes in the community was an "essential ingredient of normal living patterns" for mentally retarded persons and that the denial of the permit was "motivated primarily by the fact that the residents of the home would be persons who are mentally retarded."[38] Nevertheless, the court concluded that the permit on its face was constitutional and that the Council's denial of the permit was constitutional. After deciding that the ordinance had no impact on a fundamental right and that mental retardation was not a suspect or quasi-suspect classification, the court applied a weak standard of review.[39] Therefore, emphasizing the legal responsibility of CLC and its residents, the safety and fears of the residents in the adjoining neighborhood, and the number of people to be housed in the home as legitimate interests of the city, the court found the ordinance rationally related to the interests, and not "arbitrary, capricious, or

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minded or alcoholics or drug addicts; private clubs or fraternal orders, except those whose chief activity is carried on as a business; philanthropic or eleemosynary institutions, other than penal institutions; and accessory uses customarily incident to any of the above uses. Section 16, subsection 9 of the zoning ordinance requires the issuance of an annual special use permit for: "[h]ospitals for the insane or feebleminded, or alcoholic or drug addicts, or penal or correctional institutions." Cleburne Living Center v. City of Cleburne, 726 F.2d 191, 193-94 (5th Cir. 1984).

35. The group home, classified as a Level 1 Intermediate Care Facility for the Mentally Retarded would be subject to extensive federal and state regulations and guidelines. 105 S. Ct. at 3252 n.2 (1985).

36. Roughly 89% of retarded persons are categorized as "mildly" retarded, meaning their IQ is between 50 and 70. "Moderately" retarded persons have an IQ between 35 and 50. A small minority of retarded persons are either "severely" retarded (IQ between 20 and 35) or "profoundly" retarded (IQ under 20). *Id.* at 3256 n.9.

37. City Council members considered the following factors in their decision to deny the special use permit: "(a) the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston; (b) the location of a junior high across the street from 201 Featherston; (c) concern for the fears of elderly residents of the neighborhood; (d) the size of the home and the number of people to be housed; (e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take; (f) the home's location on a five hundred (500) year flood plain; and (g) in general, the presentation made before the City Council." 726 F.2d at 202.

38. *Cleburne*, Joint App. at 94, Findings 30, 28.

39. *Id.* at 102-103.

irrational."[40]

The United States Court of Appeals for the Fifth Circuit reversed,[41] finding that mental retardation was a quasi-suspect classification and that, under heightened scrutiny, the zoning ordinace was invalid on its face and as applied because it did not substantially further any important governmental interest. The Fifth Circuit relied on the indicia of suspectness identified in *San Antonio Independent School District v. Rodriguez*[42] to conclude that, first, mentally retarded persons have been subject to a history of grotesque mistreatment which has led to popular fears and uncertainty;[43] second, mentally retarded people have been relegated to a position of political powerlessness;[44] and third, mental retardation is an immutable condition deserving of special consideration.[45] The court hinted that the mentally retarded may be a "discrete and insular" minority meriting protection.[46] The Fifth Circuit then proceeded to apply the heightened standard of scrutiny, rejecting all of the objectives posited by the City in defense of the ordinance and all the factors which influenced the Council's decision to deny the permit.

B. *The Response of the United States Supreme Court*

1. The Majority Opinion

The majority opinion, authored by Justice White,[47] sent a mixed message to the developmentally disabled and the advocates who championed their cause, leaving the taste of a bittersweet victory. On one hand, the Supreme Court voted nine to zero that the special use permit requested by the Cleburne Living Center (CLC) and Jan Hannah was unconstitutional. At the same time, this substantial triumph for CLC was marred by the Court's decision, in a vote of six to three, that people with mental retardation are not entitled to be recognized as a suspect or quasi-suspect class deserving the special constitutional protection of heightened scrutiny. Observers of constitutional trends received a similarly mixed signal from the Court and bore witness to the rare phenomenon of rationality with bite[48] when the Court struck down the ordinance as providing no rational relation to the City's legitimate interests.

Justice White began his analysis with an overview of past equal protection cases in an attempt to reaffirm the Court's adherence to the

40. *Id.* at 103.
41. 726 F.2d 191 (5th Cir. 1984).
42. 411 U.S. 1 (1973).
43. 726 F.2d at 197.
44. *Id.* at 197-98.
45. *Id.* at 198.
46. *Id.* This criterion is taken from Justice Stone's famous footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").
47. 105 S. Ct. 3249 (1985).
48. *See supra* note 16 and accompanying text.

multi-tiered standard of review.[49] He set the tone of the decision by indicating that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude . . . and the Constitution presumes that even important decisions will eventually be rectified by the democratic processes."[50] Armed with this constitutional premise, Justice White foreshadowed his ultimate conclusion by noting that deferential treatment based on age had yet to be accorded intermediate scrutiny.[51]

Against this background, the majority concluded that mental retardation would receive the treatment normally accorded any other classification based on social and economic legislation. Justice White advanced several arguments to support his decision. First, mentally retarded persons' reduced ability to cope with the everyday world legitimizes the state's interest in dealing with and protecting them.[52] Moreover, mental retardation covers such a broad array of conditions[53] that decisions on how to treat retarded people are best left to legislators aided by qualified professionals, and not the judiciary.[54]

Justice White's second point stresses the recent legislative solutions to the problems facing the mentally retarded at both the federal and state levels that "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[55] The abundance of legislation, for Justice White, reflects the undeniable distinction between retarded persons and others.[56] Therefore, the approval of such legislation indicates that governmental, and not judicial, consideration of the differences should be the desirable end. Given the "wide variation" in the abilities and needs of retarded persons, governmental bodies must be accorded some freedom in shaping their remedial efforts.[57]

Third, the significant legislative response to the needs of this group persuaded Justice White that the mentally retarded were not politically powerless.[58] This proposition is indeed ironic if one closely examines the majority opinion. Previously, Justice White had cited the Developmental Disabilities Assistance and Bill of Rights Act[59] as reflecting the affirmative response the legislature has taken toward the plight of the mentally retarded citizen. However, in *Pennhurst State School and Hospital v. Halderman*[60] (*Pennhurst* I), the Supreme Court concluded that the rights provisions of the Act were merely advisory guidelines and not ab-

49. *See generally* Part II *supra*.
50. 105 S. Ct. at 3254.
51. *Id.* at 3255.
52. *Id.* at 3256.
53. *See supra* note 36.
54. *Id.* at 3256.
55. *Id.*
56. *Id.* at 3257.
57. *Id.*
58. *Id.*
59. 42 U.S.C. § 6000 (1982).
60. 451 U.S. 1 (1981).

solute obligations which could be enforced against the states.[61] Congress has yet to make these guidelines enforceable.

Last, Justice White predicted that if mental retardation was recognized as a quasi-suspect classification, then the floodgates would be open for other groups with "immutable disabilities setting them off from others" to claim special constitutional deference.[62] Instead of creating a new quasi-suspect class, "we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us."[63] Therefore, the majority settled on the rational relationship standard which afforded government the latitude both to assist the retarded and to engage in activities which would burden retarded persons in "incidental matters."[64]

Surprisingly, despite use of the minimum level of scrutiny, the Court invalidated the zoning ordinance insofar as it required a special use permit for group homes.[65] Because the requirement of a special use permit, as applied under the circumstances of this case, violated equal protection of the laws, the Court did not decide whether the special use permit was facially invalid where mentally retarded persons were concerned, leaving unanswered questions concerning the rights of mentally retarded persons to live in the community.[66] The majority focused its decision on the fact that the City required a special use permit for the operation of a facility for the mentally retarded, while other uses, such as hospitals, dormitories, and nursing homes for convalescents or the aged, did not require a special use permit. Justice White concluded that mentally retarded persons as a class may be different from those persons occupying facilities permitted in an R-3 zone without a special permit, but the difference was "largely irrelevant" to any legitimate interests of the City.[67] The record revealed no rational basis for the City of Cleburne to believe that the group home posed any special threat to legitimate interests of the City.[68]

Justice White proceeded to specifically reject the factors upon which the decision of the district court purportedly rested. First, and most significantly, the negative attitudes or fears of neighborhood residents, "unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[69] The City's concern for the location of the facility across the street from a junior high school (itself attended by about 30 mentally

61. *Id.* at 17.
62. 105 S. Ct. at 3258.
63. *Id.*
64. *Id.*
65. *Id.* at 3258-60.
66. *Id.* at 3254 n.8. The Court in *Cleburne* refused to address the issue of "single family" zoning restrictions on group homes.
67. *Id.* at 3259.
68. *Id.*
69. *Id.*

retarded persons) and the fact that the home was situated on a 500 year flood plain were quickly dismissed by Justice White as "vague, undifferentiated fears" especially when considered with the other dwellings similarly situated which were not required to obtain the special permit.[70] Additionally, doubts raised by the City about the legal responsibility for actions which the mentally retarded might take; the size of the home and number of people that would occupy it; fire safety; congestion of the streets; concentration of population; and the serenity of the neighborhood, failed to rationally justify singling out this particular group home for a special permit when no restrictions were imposed on the other uses freely permitted in the neighborhood.[71]

Justice White ended his analysis by noting that the requirement of the special use permit for the Featherston facility was based on an "irrational prejudice" against the mentally retarded.[72] Therefore, *Cleburne* is certain to remain a useful precedent in attacks on zoning ordinances which discriminate against the housing needs of people who are mentally retarded, especially where the fears and prejudices of neighbors lie at the heart of the community's decision to exclude a group home.[73]

2. The Concurring Opinion

Justice Stevens, joined by Chief Justice Burger, wrote a separate concurring opinion to express a shared view of equal protection analysis. Quite succinctly, Justice Stevens reaffirmed his opinion first expressed in *Craig v. Boren*[74] that equal protection cases have delineated no separate, identifiable strands of review; but instead, reflect "a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."[75]

In an interesting development, Justice Stevens focused on the special needs and limitations which the mentally retarded, and for that matter, any disadvantaged group could recognize in themselves. Thus, there are many legitimate legislative decisions placing mentally retarded persons in a special class, which although they disadvantage retarded persons, are not presumptively irrational.[76] For example, restrictions on a retarded person's right to operate an automoblile, which deprive him of the employment opportunities and freedom to travel that other citizens enjoy, seem rational. However, in this particular case, Justice Stevens stated that the court of appeals was correct when it "observed

70. *Id.*
71. *Id.* at 3259-60.
72. *Id.* at 3260.
73. Ellis & Luckasson, *Discrimination Against People with Mental Retardation: A Comment on the* Cleburne *Decision*, 23 MENTAL RETARDATION 249, 251 (1985).
74. *See supra* notes 27-29 and accompanying text.
75. 105 S. Ct. at 3261. Justice Steven's reference to a "continuum of judgmental responses" is outwardly similar to the "sliding scale" analysis of Justice Marshall posited in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99, *reh'g denied*, 411 U.S. 959 (1973) (Marshall, J., dissenting).
76. 105 S. Ct. at 3262.

that through ignorance and prejudice the mentally retarded 'have been subjected to a history of unfair and often grotesque mistreatment.' "[77] Justice Stevens agreed with the majority's reasoning with regard to invalidation of the special use permit, concluding that "a rational member of this disadvantaged class" would never "approve of the discriminatory application of the City's ordinance in this case."[78]

3. The Opinion of Justice Marshall

Justice Marshall, joined by Justices Brennan and Blackmun, agreed with the outcome of the case, but vigorously dissented from the majority's "novel and truncated" proposition that mentally retarded persons were not entitled to a quasi-suspect classification.[79] The first part of Justice Marshall's opinion amounted to a scathing criticism of Justice White's majority decision. Justice Marshall initially raised two paradoxes in the majority decision: first, a discussion of heightened scrutiny was superfluous to an invalidation of the zoning ordinance on rational basis grounds;[80] and second, the Court, while labeling its decision a rational basis review had, in fact, utilized a heightened standard of review — dubbed "second order" rational basis — to declare the requirement of a special use permit unconstitutional.[81]

Justice Marshall continued, stating that normally "the burden is not on the legislature to convince the Court that the lines it has drawn are sensible," yet in this case, the majority required a justification from the City.[82] Additionally, under the traditional rational basis standard, the Court does not rely on the record to judge whether policy decisions are supported by a firm factual foundation.[83] In Justice Marshall's view, the *Cleburne* majority, by refusing to acknowledge that a heightened standard of review was being used, created a precedent for a rationale review, and not a rational basis standard of review. The Supreme Court and lower courts now have a license to search for rationales which support economic and commercial classifications in a manner similar to the dark days of equal protection.[84] Furthermore, in failing to articulate the factors which justify invocation of this "second order" rational basis standard, Justice Marshall believes the majority has left the lower courts "in the dark" as to when the more searching scrutiny is required.

The second part of Justice Marshall's opinion reiterated his long-held belief[85] that "the level of scrutiny . . . should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular clas-

77. *Id.* at 3262 (quoting *Cleburne Living Center*, 726 F.2d at 197).
78. *Id.* at 3263.
79. *Id.*
80. *Id.*
81. *Id.* at 3264.
82. *Id.* at 3265.
83. *Id.* at 3264.
84. *Id.* at 3265. *See also* Lochner v. New York, 198 U.S. 45 (1905).
85. *See supra* notes 19-23 and accompanying text.

sification is drawn.' "[86] He then set forth his test by which the zoning law should be judged; that is, the ordinance should "be convincingly justified as substantially furthering legitimate and important purposes."[87] Analyzing the case, Marshall found that mentally retarded persons have a substantial interest in establishing group homes.[88] Second, mentally retarded persons have been subjected to a "grotesque" history of segregation and discrimination based only on vague generalizations.[89]

Justice Marshall proceeded to reexamine the justifications used by the majority to support its opinion, only to conclude that they could not "withstand logical analysis."[90] In spirited language, Justice Marshall presented a forceful argument for judicial interventionism, since courts "do not sit or act in a social vacuum."[91] Developing an evolving doctrine of constitutional equality, Justice Marshall advocated a Court which advances, or "catalyzes," legislative changes that would constantly remain loyal to the fundamental undercurrent of equality running through the law.[92] Justice Marshall then noted that the fact that mentally retarded persons are no longer politically powerless does not indicate that they are no longer a group with special characteristics and needs. For example, simply because legislation has been enacted to deal with racial discrimination, does not mean that the Court has made race-based classifications any less suspect.[93]

Justice Marshall continued by criticizing the two principles apparently central to the majority opinion. First, the belief that heightened scrutiny is inapplicable where the individuals in a group are different and that the legislature properly may take this into account, is unsound. Women have distinctive characteristics, and yet heightened scrutiny applies to them.[94] Similarly, the fact that legislation affecting a group is likely to be valid has no logical application to the denial of heightened scrutiny, especially where similarly situated groups — women, illegitimates, and aliens — have the benefit of a higher standard.[95]

Last, Justice Marshall expressed his concern that the majority merely invalidated the ordinance as it applied to the respondents in this case, and did not strike down the permit requirement on its face. He dissented "from the novel proposition that 'the preferred course of adjudication' is to leave standing a legislative act resting on 'irrational prej-

86. 105 S. Ct. at 3265 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99, *reh'g denied*, 411 U.S. 959 (1973) (Marshall, J., dissenting)).

87. 105 S. Ct. at 3265. *See* Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); Plyler v. Doe, 457 U.S. 202, 230-31 *reh'g denied*, 458 U.S. 1131 (1982) (Marshall, J., concurring); *see also*, Mills v. Habluetzel, 456 U.S. 91, 99-100 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973).

88. *Cleburne*, 105 S. Ct. at 3266.

89. *Id.* at 3266-68.

90. *Id.* at 3268.

91. *Id.*

92. *Id.* at 3268-69.

93. *Id.* at 3269.

94. *Id.* at 3269-70.

95. *Id.* at 3270-71.

udice' . . . thereby forcing individuals in the group discriminated against to continue to run the act's gauntlet."[96] In effect, the Court left unanswered questions for the future "[b]y leaving the sweeping exclusion of the 'feeble-minded' to be applied to other groups of the retarded."[97] Instead, facial invalidation of the ordinance's treatment of the mentally retarded would have placed the responsibility for tailoring a new ordinance on the City of Cleburne.[98]

IV. THE COURT AFTER *CLEBURNE*: JUSTICE STEVENS' PRAGMATIC STABILITY AMIDST THE REIGN OF CONFUSION

The discussion thus far has attempted to expose equal protection adjudication as a constitutional procrustean bed which forces governmental classifications into three inflexible positions on an anachronistic scale. Disenchantment with the multi-tiered standard of review has transformed the equal protection clause into a talisman for the Court's divination of legitimate state goals when weighed implicitly against the interests of disadvantaged persons. In *Cleburne*, though, lies an inkling of hope that the seeds of transition have been sown by Justice Stevens. The concurring opinion of Justice Stevens, summarized above,[99] is therefore worthy of special attention in that it proposes a viable alternative to traditional equal protection.

The concurring opinion of Justice Stevens presages an increased willingness by the Supreme Court to redefine equal protection. Indeed, it is significant to note that the concurrences of Justices Stevens and Burger, when grouped with the dissents of Justices Marshall, Brennan and Blackmun, constitute a five Justice bloc which would not have applied the same quality of equal protection analysis as the Court. As a result, the Court left the door open for the lower courts to apply a level of review running the gamut from somewhere just below heightened scrutiny to something a little more than the deference of the rational basis standard.[100]

Admittedly, upon examination, Justice Stevens' early opinions in the area of equal protection are as obfuscated as the opinions of the rest of the Court. In *Mathews v. Lucas*,[101] where the court upheld a classification scheme based on illegitimacy, Justice Stevens, in dissent, argued for a more intensive scrutiny of legislative categorizations based on the "habit" of considering illegitimates as undeserving of special protection.[102] Aside from a discomfort with the multi-tiered standard and a fierce loyalty to traditionally disfavored groups, the Justice's dissent in *Lucas* provided little insight into a unique interpretive philosophy. How-

96. *Id.* at 3272.
97. *Id.* at 3273.
98. *Id.*
99. *See supra* notes 74-78 and accompanying text.
100. *Summary, Analysis, and Commentary*, 9 MENTAL DISABILITY L. REP., 242, 243 (1985).
101. 427 U.S. 495 (1976).
102. *Id.* at 520-21 (Stevens, J., dissenting).

ever, *Craig v. Boren*,[103] a case presenting a challenge to a statute which set the minimum age for purchasing 3.2 percent beer at age eighteen for women and age twenty-one for men, marked Justice Stevens' abandonment of the three-tiered system in favor of a "single standard" of review.[104] Although Justice Stevens' refusal to articulate a proper standard of review may have frustrated those in search of a well-defined judicial decree from on high, perhaps *Boren* foreshadowed a loftier purpose. Justice Stevens, in opting for a balancing approach, recognized that attempting to define an appropriate standard is futile,[105] because the range of potential "modes" of review between utter deference and the strictest scrutiny is infinite.

Cleburne suggests that Justice Stevens finally has synthesized the doctrinal threads running through the fabric of equal protection into a workable theory destined to be implemented in Supreme Court practice. More importantly, *Cleburne* reflects a dialectical progression by Justice Stevens which transcends the muddled confusion that pervades equal protection analysis. It is indeed prophetic that a man who has confused conservatives, liberals, and scholars alike with his refusal to be typecast should lead the Court from chaos into coherence.[106] In a similar fashion, Justice Stevens has purposely avoided categorizing his approach to equal protection, and therefore, it is difficult to label a test which the Court and practitioners may employ in every equal protection case. Some characteristics of Justice Stevens' interpretive philosophy, though, are readily identifiable and, in all likelihood, will be honed into a newer equal protection.

First, Justice Stevens deliberately eschews the troika of traditional standards in equal protection. In *Cleburne*, he stated that he has "never been persuaded that these so-called 'standards' adequately explain the decisional process."[107] Second, the Justice has a "pronounced streak of Frankfurterianism tempered by a willingness to apply the law vigorously"[108] in those areas where the rights and interests of a disadvantaged group outweigh countervailing interests of judicial restraint and federalism. In other words, Justice Stevens engages in a "balancing of interests" approach which determines the strength of conflicting interests — which presumably exist outside of the judge's mind — and balances them objectively.

Justice Stevens' balancing formula is three-pronged. First, an initial determination of the character of the challenged governmental classification, as it relates to the class that has been allegedly harmed, is made.

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103. 429 U.S. 190 (1976), *reh'g denied*, 429 U.S. 1124 (1977).

104. *Id.* at 211-12 (Stevens, J., concurring).

105. Special Project, *Justice Stevens: The First Three Terms*, 32 VAND. L. REV. 671, 713-15 (1979).

106. Ball & Ulhman, *Justice John Paul Stevens: An Initial Assessment*, 1978 B.Y.U. L. REV. 567, 569 (1978).

107. 105 S. Ct. at 3261.

108. Beytagh, *Mr. Justice Stevens and the Burger Court's Uncertain Trumpet*, 51 NOTRE DAME LAW. 946 (1976).

Justice Stevens looks to either: the nature of the classification itself, that is, if the class has been subjected to a "tradition of disfavor"[109] as in *Cleburne* and *Lucas*; or, the effect of the legislation on those persons affected by it, as in *Zablocki v. Redhail*.[110] In *Zablocki*, the Court invalidated a Wisconsin statute which provided that a resident "having minor issue not in his custody and which he is under an obligation to support by any court order" could not marry without court permission.[111] Justice Stevens, in a concurring opinion, concluded that although the state had a legitimate interest in protecting children who were not in custody, the statute, in effect, deliberately discriminated against the poor. Thus, Justice Stevens provides both a qualitative and quantitative aspect, respectively, to a determination of the character of a classification.

Second, after characterizing the classification, Justice Stevens considered whether the proffered legislative purpose was the actual basis for the decision to create the restrictive classification. He concluded, in *Cleburne*, that the proffered purpose for the requirement of an annual special use permit — protection of the mentally retarded persons who would live in the group home — was merely a guise for the actual basis, the irrational fear and prejudice of the neighboring land owners.[112]

In theory, after satisfaction of the requirement of an actual purpose, Justice Stevens' formula is applied to closely examine the justifications urged to support the governmental action. Therefore, this third step comprises the actual balancing of the state's legitimate purposes and the interests of the disadvantaged group. Justice Stevens quickly concluded in *Cleburne* that zoning ordinances are not usually justified by an unconvincing desire to protect mentally retarded persons from "the hazards presented by the neighborhood."[113] This prong operates to discourage legislative bodies from conjuring up unconvincing and irrational justifications solely in defense of challenges to a classification.[114] Another significant characteristic of Justice Stevens' equal protection analysis is his redefinition of the term "rational" and the consequent bolstering of the "old" rational relationship test.[115] *Cleburne* advises that "rational basis" demands a stronger showing by the legislature: that the classification be actually a legitimate interest of the state; and that, as applied, the classification treat all whom it affects impartially.[116]

Moreover, the intellectual merit of Justice Stevens' approach cannot be overestimated. As mentioned above, Justice Stevens' opinion in

109. 105 S. Ct. at 3261. *See* Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 155, 214 (1978).

110. 434 U.S. 374 (1978).

111. *Id.* at 375.

112. 105 S. Ct. at 3262. *See* Special Project, *supra* note 105 at 714 ("[T]he principal concern in Justice Stevens' equal protection analysis is finding an actual legislative purpose. If he finds none, the classification is invalid; if an actual legislative purpose is evident, he generally defers to it.").

113. 105 S. Ct. at 3263.

114. *See* Special Project, *supra* note 105 at 714.

115. *See supra* note 16 and accompanying text.

116. 105 S. Ct. at 3263.

Cleburne represents a dialectical progression towards a workable reformulation of equal protection. If one reads *Cleburne* in the order of Justice White's majority opinion, then Justice Marshall's dissent, and finally, Justice Stevens' concurrence, the dialectical synthesis is self-evident. In other words, Justice Stevens retained the best elements of both Justice White's thesis — rationality with bite — and Justice Marshall's antithesis — intermediate scrutiny — to develop a wide-ranged synthesis fully capable of filling the immeasurable void between the traditional tiers of review, and thus competently adjudicate the broad scope of equal protection challenges intrinsic to this generation. For example, one of the characteristics comprising intermediate scrutiny — the assessment of the importance of the governmental interest — has been appropriated into the first prong of Justice Stevens' balancing approach, the characterization of the governmental classification.[117] This type of intellectual innovation is certain to distinguish Justice Stevens from the rest of the Court and solidify a position of Court leadership and constructive influence.

However, one would be most neglectful in analyzing Justice Stevens' approach if one refused to unmask the inherent flaws in his argument. While Justice Stevens' equal protection analysis frees the Court from the doctrinal confines of the three-tiered model, it gives no guidance to legislatures as to the limits of constitutionally permissible legislation.[118] Another criticism of Justice Stevens' balancing approach, which by its very nature contains elements of a more searching rational basis test, is the potential for the Court to review an even broader array of governmental classifications and thereby infringe upon that which is properly within the legislative domain.[119]

V. CONCLUSION

Cleburne marks a transition in equal protection analysis. The divergent opinions of Justices White and Marshall reflect the inconsistency of the three-tiered model, and therefore, indirectly reinforce Justice Stevens' substitute method of review.

The decision is also noteworthy in that it signals a change in the personality of the Court, guided by the pragmatism of Justice Stevens. *Cleburne* reflects the shift of Justice Stevens from the undifferentiated middle to the intellectual standard-bearer of the Court. Therefore, the future of the Court appears much brighter if the skillfully structured consistency of Justice Stevens can unseat the strong ideologies — both liberal and reactionary — that constitute the Supreme Court.

Charles T. Passaglia

117. Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 155, 214 (1978).
118. *Id.* at 216.
119. *Id.*

FEDERAL ELECTION COMMISSION V. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE: A JUDICIAL CURE FOR CONGRESSIONAL OVERZEALOUSNESS IN PRESIDENTIAL CAMPAIGN FINANCE REGULATION

INTRODUCTION

The United States Supreme Court in *Federal Election Commission v. National Conservative Political Action Committee*[1] abandoned its traditional conservative mode of analysis and invoked the first amendment[2] to strike down statutory limits on the independent expenditures[3] of political action committees (PACs).[4] This uniquely aligned opinion[5] applied a liberal interpretation of the first amendment to unlock the shackles placed by Congress upon PACs' independent expenditures. The conservative faction of the Court, led by Justice Rehnquist,[6] stepped away from its deferential attitude toward legislative determinations in complex lawmaking, and refused to constitutionally approve a key section of Congress's election financing scheme.

Specifically, in Part I of its opinion, the majority found that a Democratic group of petitioners lacked standing to invoke expedited judicial

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1. 105 S. Ct. 1459 (1985).

2. U.S. CONST. amend. I.

3. Specifically, the Court invalidated 26 U.S.C. § 9012(f) (1982), which set forth:

> Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

Paragraph (2) of the section has no application to the facts in this case.

Independent expenditures are spent without the guidance of or coordination with a candidate or a campaign committee. *See infra* text accompanying notes 59-61. The party who makes an expenditure directly controls the avenue by which a political view is expressed. For example, an expenditure includes purchasing a newspaper ad independently to voice one's opinion on an issue. *See infra* Comment, note 29, at 432-36.

Contributions, on the other hand, are given directly to the campaign committee of a candidate. At the time of contribution, the campaign committee gains complete control over the donated funds. *See* Richards, *The Rise and Fall of the Contribution/Expenditure Distinction: Redefining the Acceptable Range of Campaign Finance Reforms*, 18 NEW ENG. L. REV. 367, 370-72 (1983) (discussing the nature of contributions).

4. PACs are formed by various corporations and groups to influence elections and lobby for special interests. PACs represent a wide range of special interests, including doctors, gun enthusiasts, auto workers, carpenters, and real estate agents. *Lawscope*, 67 A.B.A. J. 280-81 (1981).

5. Rehnquist, J., delivered the opinion of the Court, in which Burger, C.J., Blackmun, Powell, and O'Connor, JJ. joined. Brennan, J., joined only in Part II of the opinion. Stevens, J., concurred in Part II of the opinion and dissented as to Part I. White, J., filed a dissenting opinion, in Part I of which Brennan, J., and Marshall, J., joined. Marshall, J., filed a separate dissent.

6. Thomas, *Court at the Crossroads*, TIME Oct. 8, 1984, at 31.

review[7] to request a declaratory judgment upholding the constitutionality of section 9012(f) of the Presidential Election Campaign Fund Act (Fund Act).[8] In Part II, the Court reached the central issue of the case, and refused to declare the section constitutional.[9] In effect, the Court proclaimed the unconstitutionality of limits on PACs' independent expenditures.

This comment will elucidate the facts surrounding the Supreme Court's decision. It also will trace the extensive background behind congressional and judicial policymaking in the election area. Finally, this comment will analyze the Court's holding and illuminate the underlying message of Justice Rehnquist's opinion.

I. FACTS OF *FEDERAL ELECTION COMMISSION V. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE*

The National Conservative Political Action Committee (NCPAC) and the Fund for a Conservative Majority (FCM) are corporations registered as political committees[10] with the Federal Election Commission (FEC).[11] Prior to the 1984 presidential elections, the two PACs announced their intentions to spend vast sums of money to further the reelection of President Ronald Reagan.[12] To counteract this conservative threat, the Democratic Party, the Democratic National Committee (DNC), and a citizen[13] (collectively, the Democrats) filed an amended complaint seeking a ruling which would declare section 9012(f) of the Fund Act constitutional,[14] and thus prohibit the PACs' spending. The FEC then intervened as a defendant to press for a dismissal of the complaint based on the Democrats' lack of standing.[15] One month later, in June of 1983, the FEC brought a cause of action seeking the same de-

7. 26 U.S.C. § 9011(b)(2) (1982), sets forth that "[s]uch proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court." This statute provides for expedited review directly from the special three-judge district court panel to the United States Supreme Court.

8. Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 26 U.S.C. §§ 9001-9013 (1971) (amended 1974).

9. 105 S. Ct. at 1471.

10. 26 U.S.C. § 9002(9) (1971) defines a political committee as "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office."

11. The FEC (created by the Federal Election Campaign Act (FECA), *see infra* note 36) has the duty to administer, enforce, and formulate policy with regard to the FECA and the Fund Act. 2 U.S.C. § 437c (1974) (amended 1980).

12. As an example of the magnitude of previous spending, NCPAC's election expenses in 1980 were over $7 million. See *Lawscope*, *supra* note 4, at 280. FCM spent over $2 million on President Reagan's bid for election in 1980. *See* Comment, *Independent Political Committees and the Federal Election Laws*, 129 U. PA. L. REV. 955, 962 (1981).

13. The private citizen, Edward Mezvinsky, was the Chairman of the Pennsylvania Democratic State Committee. 105 S. Ct. at 1462.

14. Democratic Party v. National Conservative Political Action Comm., 578 F. Supp. 797, 803 (E.D. Pa. 1983), *rev'd in part*, 105 S. Ct. 1459 (1985).

15. *Id.*

claratory judgment requested by the Democrats.[16] The three-judge panel formed pursuant to the Fund Act[17] consolidated both of the cases and heard arguments.[18]

The district court granted the Democrats and the FEC standing under section 9011(b)(1)[19] and Article III of the Constitution.[20] On the merits, the court refused to declare section 9012(f) constitutional.[21] The panel did not, however, declare the section unconstitutional. The panel found that the limitations on political committee expenditures constituted an impermissibly overbroad violation of fundamental first amendment rights of freedom of speech and association.[22] Furthermore, the court refused to save the law by limiting the scope of the Fund Act.[23]

The Democrats and the FEC filed cross appeals to the Supreme Court in accordance with the expedited review provisions of the Fund Act.[24] The Supreme Court subsequently reversed the grant of standing to the Democrats, but affirmed the panel's refusal to declare section 9012(f) constitutional.[25]

II. BACKGROUND

A. *Historical Analysis of the Federal Campaign Financing Law Scheme*

Issues of campaign funding have challenged the people of the United States and their government since the founding fathers presented the Constitution to the original thirteen colonies. James Madison warned that when the citizen loses control over the government, wealth and birthright can poison a free election process.[26] To avert this evil, Madison suggested a system in which the people play the role of the masters with the elected officials as slaves.[27]

Unfortunately, Madison's fears came to reality at the turn of this century, when corporations during the industrial revolution began to exhibit undue influence over the nation's election process. The industrial giants of the time were amassing huge sums of money and using

16. *Id.*
17. 26 U.S.C. § 9011(b)(2) (1982). *See supra* note 7.
18. *Democratic Party*, 578 F. Supp. at 803.
19. 26 U.S.C. § 9011(b)(1) (1982) (states that "[t]he Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or con[s]true any provision of this chapter").
20. U.S. CONST. art. III, § 2, cl. 1, which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."
21. *Democratic Party*, 578 F. Supp. at 840.
22. *Id.*
23. *Id.*
24. 26 U.S.C. § 9011(b)(2) (1982). *See supra* note 7.
25. 105 S. Ct. at 1471.
26. Roeder, *Is Congress the Best that PAC's Can Buy?*, Rocky Mountain News, July 21, 1985, at 61, col. 1 (quoting THE FEDERALIST No. 57 (J. Madison)).
27. Correspondence from Lewis H. Larue, *Politics and the Constitution*, 86 YALE L.J. 1011 (1977).

"war chests" to make unlimited campaign contributions. In an effort to prevent the corrupt effects of large accumulations of wealth upon the federal election process, Congress enacted the Tillman Act in 1907[28] which barred national banks and other federally-chartered corporations from making contributions to candidates in any election.[29] Eighteen years later, Congress strengthened the Tillman Act by voting into law the Federal Corrupt Practices Act.[30] The new law created the first contribution reporting requirements[31] in an attempt to curb the political indebtedness of elected officials to their major campaign contributors.[32] Labor unions were similarly regulated by the 1943 War Labor Disputes Act.[33] Regulation of individuals, however, did not occur until the enactment of the Hatch Political Activities Act of 1939.[34]

These statutes were fairly effective in creating a basic framework for election financing. Spiraling campaign expenditures, however, became a topic of intense debate during President Nixon's term in office.[35] Congress toughened the regulatory system in 1971 by enacting two complex campaign financing laws: the Federal Election Campaign Act (FECA) and the Fund Act.[36] Congress promulgated the FECA to

28. Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907), stated

> [t]hat it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State Legislature of a United States Senator.

29. *See* Comment, *The Constitutionality of Limitations on Individual Political Campaign Contributions and Expenditures: The Supreme Court's Decision in Buckley v. Valeo*, 25 EMORY L.J. 400, 402 (1976) (technical analysis of the early campaign laws).

30. Ch. 368, tit. III, 43 Stat. 1070 (1925) (repealed 1972).

31. Ifshin & Warin, *Litigating the 1980 Presidential Election*, 31 AM. U.L. REV. 487 (1982). These requirements forced campaign committees to file a statement containing names and addresses of all contributors with the Clerk of the House of Representatives. The law also required the committees to report the amount of all contributions received.

32. Comment, *supra* note 29, at 403. Justice Frankfurter explained that the statute's "aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." United States v. UAW, 352 U.S. 567, 575 (1957).

33. Pub. L. No. 78-89, ch. 144, § 9, 57 Stat. 163 (1943) (also known as the Smith-Connelly Act); *see also* Taft-Hartley Labor Management Relations Act of 1947, Pub. L. No. 80-101, ch. 120, § 304, 61 Stat. 136, 159 (which strengthened the power of the War Labor Disputes Act).

34. Pub. L. No. 76-252, ch. 410, 53 Stat. 1147 (codified at 5 U.S.C. §§ 7321-7327 (1976)) (barring federal employees from campaigning for candidates for federal office, and barring candidates from using federal employment or benefits as a reward for campaign support).

35. Spending during the 1968 presidential campaign equaled $44.2 million. In 1972, spending for the presidential race rose dramatically to $83 million. Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395 (1982).

As spending continued to skyrocket throughout the 1970's, large disparities between Republican and Democratic monetary outlays became evident. For instance, in all 1980 campaigns, approximately $400 million were raised by candidates. Republicans solicited $108 million from individual contributors, while the Democrats could raise only a paltry $19 million from individuals. T. WHITE, AMERICA IN SEARCH OF ITSELF 426 (1982).

36. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 2 U.S.C. §§ 431-454 (amended 1980); Fund Act, *supra* note 8.

broaden the public's awareness of the source of campaign contributions.[37] For the first time, this statute set forth ceilings on campaign spending and extensive disclosure provisions.[38] Concurrently, the Fund Act created a public funding mechanism for presidential elections.[39] These two laws, although enacted separately, blended to form an extensive set of election financing guidelines.[40]

Despite congressional efforts to control campaign corruption through the FECA and the Fund Act, the eruption of Watergate caused the nation to view the presidential election process in an intensely skeptical manner. In response to this public outcry,[41] Congress amended each of the Acts in 1974. The FECA amendments placed limits on campaign contributions[42] and expenditures,[43] required reporting of campaign committee receipts and disbursements,[44] and created the FEC to enforce the provisions of the Acts.[45] The Fund Act amendment required presidential and vice-presidential candidates to make the mutually exclusive choice between accepting either public campaign funding or financing from private sources.[46]

B. *Buckley v. Valeo*

A major setback for Congress occurred in 1976 when the Supreme Court determined that several sections of the 1974 FECA amendments could not pass constitutional scrutiny. Before the 1976 presidential campaign went into full swing, a variety of politically involved parties[47] brought suit against the federal government to determine the constitu-

37. Annot. 18 A.L.R. FED. 959 (1974).

38. The Act placed specific limits on expenditures made by candidates for advertising in the media. Pub. L. No. 92-225, 86 Stat. 3, 47 U.S.C. 104 (a), (b)(1972) (repealed 1974). *See* Berry & Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. ON LEGIS. 331 (1973) (thorough analysis of the FECA's legislative history).

The FECA's disclosure requirements mandated that political committees follow a certain form of organizational structure. 2 U.S.C. § 432 (1972) (amended 1980). The FECA also required political committees to register and file a statement of organization with the FEC. 2 U.S.C. § 433 (1972) (amended 1980). After a political committee began accepting contributions, the statute required the committee to file reports of receipts and disbursements with the FEC. 2 U.S.C. § 434 (1972) (amended 1980). *See also* Ifshin & Warin, *supra* note 31, at 495.

39. The Fund Act provided for public funding of presidential elections. To raise money for the election fund, Congress established a system whereby taxpayers could contribute one dollar with the filing of their tax returns. 26 U.S.C. § 6096 (a) (1971).

40. Ifshin & Warin, *supra* note 31, at 495.

41. *Id.* at 492.

42. 2 U.S.C. § 441a(a)(1)(A) (1976).

43. 18 U.S.C. § 608(e)(1) (1974) (repealed 1976) (as an expenditure limit example).

44. 2 U.S.C. § 434(a) (1971) (amended 1980).

45. 2 U.S.C. § 437(c) (1974) (amended 1980). *See supra* note 11.

46. In 1976, Congress repealed several provisions of the law which had been struck down by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976). In 1979 and 1980, Congress made further incidental revisions to the FECA and Fund Act. The latest improvements attempted to streamline the Acts' procedural application by simplifying disclosure requirements. *See* Ifshin & Warin, *supra* note 31, at 496.

47. The plaintiffs included candidates, political parties, public interest groups, and PACs. *Buckley*, 424 U.S. at 7-8.

tionality of the 1974 FECA amendments. After accepting jurisdiction, the Court granted standing to each party.[48] The Justices also sanctioned the public funding[49] and disclosure[50] aspects of the law, while striking down the FEC appointment procedure.[51]

More importantly, however, the *per curiam* opinion upheld the *contribution* limitations of the Act[52] while invalidating the *expenditure* ceilings.[53] Generally, the Court found that fundamental rights of free speech and association were infringed upon by both categories of limitations.[54] The first prong of the strict scrutiny analysis applied by the Court required the government to prove "compelling" congressional interests behind the promulgation of the law.[55] The second prong required congressional means "closely drawn to avoid unnecessary abridgement" of the interest.[56]

The contribution limits passed strict scrutiny because the Justices believed that these caps only incidentally affected crucial first amendment guarantees.[57] The Court concluded that Congress's motive to

48. *Id.* at 12.

49. *Id.* at 92-93 (The Court agreed with Congress's goal in creating public financing "to use public money to facilitate and enlarge public discussion and participation in the election process, goals vital to self-governing people."); *see supra* note 39.

50. *Buckley*, 424 U.S. at 84; *see supra* note 38.

51. *Buckley*, 424 U.S. at 135. The Court concluded that since a majority of the members of the FEC were appointed by the President *pro tempore* of the Senate and the Speaker of the House, the selection procedure violated appointment guarantees provided to the President by the appointment clause. The appointment clause states that the President "shall nominate, and by and with the Advise and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." U.S. CONST. Art. II, § 2, cl. 2.

52. *Buckley*, 424 U.S. at 29. The contribution limitations upheld by the Court included individual contribution caps of $1,000 to a single candidate, a political committee contribution ceiling of $5,000 to a single candidate, and a $25,000 limit on individual contributions to all candidates within a single year. 18 U.S.C. § 608(b) (repealed 1976).

53. *Buckley*, 424 U.S. at 51. The expenditure limits overturned included independent expenditure restrictions placed on relatives of candidates, limits placed on a candidate's expense of personal funds, ceilings placed on individual expenditures targeted to affect a clearly identified candidate, and limits placed on the overall expenses of a campaign. 18 U.S.C. § 608(a), (c), and (e) (1974) (repealed 1976).

54. The Court acknowledged that expenditures are entitled to first amendment protection:

> "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957) . . . . This no more than reflects our "profound national committment to the principle that debate on public issues should be uninhibited, robust, and wide-open," N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269, 270 (1964).

Buckley, 424 U.S. at 14.

55. *Id.* at 25; *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (elucidating the Court's strict scrutiny first amendment test).

56. *Buckley*, 424 U.S. at 25.

57. *Id* at 21. The Court defined what later became known as "speech by proxy": "the transformation of contributions into political debate [which] involves speech by someone other than the contributor." *Id*; *see also* Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 18 HARV. J. ON LEGIS. 679 (1981). *See generally* Comment, *supra* note 29, at 429 (analyzes the Court's "speech-by-proxy" statement); *Recent Decisions*, 49 GEO. WASH. L. REV. 801, 814 (1981) (criticizing and explaining the application of Buckley's contribution distinction in Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd* 101 S. Ct. 1344 (1981)).

eliminate the infamous *quid pro quo*[58] was sufficiently compelling to justify this minor infringement.

The independent expenditure ceilings, on the other hand, failed to pass the Court's strict scrutiny review. The opinion equated constitutionally-protected speech with the spending of money to directly further one's political views.[59] The Justices then found that basic constitutional rights were heavily infringed upon by the expenditure limitations.[60] The Court rejected the law as a method to further the government's single compelling interest of eliminating the evil *quid pro quo*, since expenditures were made without prearrangement, cooperation, or coordination with the candidate.[61] Therefore, the expenditure ceilings were invalidated.

C. *Post*-Buckley *Decisions*

After *Buckley*, the Supreme Court began to show a definite trend in its holdings concerning election financing laws. The Court struck down several laws which limited independent expenditures.[62] In *First National Bank v. Bellotti*,[63] various corporations and banks opposed an amendment to the Massachussetts Constitution that would have allowed a graduated personal income tax. Yet they could not fight this amendment because of a state law which prohibited corporate spending to influence the outcome of public issues submitted to the voters.[64] The groups, therefore, brought an action challenging the constitutionality of the law. The Court struck down the statute,[65] and noted that spending to express political views "is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[66]

In another public-issue case, a group of citizens vehemently opposed a ballot measure which would have placed rent controls on many

58. When a contributor gives money to a candidate in exchange for a favor in the future, a *quid pro quo* has occurred. *See* Citizens Against Rent Control v. City of Berkley, 454 U.S. 290, 297 (1981).

59. According to the Court, the first amendment must protect political expenditures "because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Federal Election Commission*, 105 S. Ct. at 1467 (quoting *Buckley*, 424 U.S. at 19).

60. 105 S. Ct. at 1467.

61. *Buckley*, 424 U.S. at 46-47. *See generally*, Comment *The Federal Election Campaign Act and Presidential Election Campaign Fund Act: Problems in Defining and Regulating Independent Expenditures*, 1981 ARIZ. ST. L.J. 977, 992 (1981) (analyzing the distinction made by *Buckley* between contributions and expenditures).

62. Common Cause v. Schmitt, 455 U.S. 129 (1982), *aff'g* 512 F. Supp. 489 (D.D.C. 1980); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

63. 435 U.S. at 795.

64. The law prohibited corporations from making expenditures or contributions for the purpose of "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768 n.2 (quoting Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1977)).

65. *Bellotti*, 435 U.S. at 795.

66. *Id.* at 777.

of the city's rental units.[67] However, these citizens felt they could not effectively lobby against the measure because a city ordinance placed a $250 expenditure limit on any contributor who wished to influence the outcome of such elections.[68] Consequently, the citizens brought suit to have the law declared unconstitutional. The Court found that the law could not promote the government's compelling interest of preventing the *quid pro quo*, because public question elections involve issues and not candidates.[69]

A further indication of the Court's distaste for limits on independent expenditures occurred in its summary affirmation of a district court ruling that held as unconstitutional section 9012(f) of the Fund Act.[70] This decision foreshadowed the *Federal Election Commision* decision, but had no precedential value since the Court was evenly split on its vote.[71]

On the contribution side of the coin, two important election financing laws have been sanctioned by the Court. In *Federal Election Commission v. National Right to Work Committee*,[72] the Court upheld an FEC enforcement action against the National Right to Work Committee (NRWC), a nonprofit corporation formed to oppose compulsive unionism. The FEC sought to enjoin NRWC from soliciting contributions for its segregated campaign fund from nonmembers, in violation of 2 U.S.C. § 441b(b)(4)(A) and (C).[73] The Court found that the regulation was "sufficiently tailored" to promote the government's interest in protecting the integrity of the campaign process.[74]

Limitations on individual contributions to PACs were upheld in *California Medical Association v. Federal Election Commission*.[75] According to the Court, contributions to PACs at best represented "speech by proxy,"[76] and a strict scrutiny analysis did not apply. The majority accepted the congressional motive of preventing actual or apparent corruption by limiting contributions.[77] The majority also explained that without the limits imposed on contributions to PACs, contributors might evade

67. *Citizens Against Rent Control*, 454 U.S. at 292.

68. The law prohibited any person from making, or any campaign treasurer from accepting contributions "in support of or in opposition to a measure . . . [exceeding] two hundred and fifty dollars ($250)." *Id.* at 229 (quoting Election Reform Act of 1974, Ord. No. 4700-N.S. (approved by the voters in Berkeley, CA)).

69. *Citizens Against Rent Control*, 454 U.S. at 297-98.

70. Common Cause v. Schmitt, 455 U.S. 129 (1982), *aff'g* 512 F.Supp. 489 (D.D.C. 1980).

71. *See* Hertz v. Woodman, 218 U.S. 205 (1910) (affirmations by evenly split vote are of no precedential value).

72. 459 U.S. 197 (1982) (upholding 2 U.S.C. § 441b(b)(4)(A), (C) (1976)).

73. Since corporations may not contribute to federal elections, this law allowed a corporation to create a "separate segregated fund" and to use this fund for campaign purposes. Money can only be solicited for the fund from "members" of the corporation. *National Right to Work Committee*, 459 U.S. at 198 n.1.

74. *Id.* at 208.

75. 453 U.S. 182 (1981) (upholding several statutes which restricted contributions to PACs).

76. *Id.* at 196. *See supra* note 57.

77. *California Medical Association*, 453 U.S. at 197.

other campaign financing laws by giving large sums of money to PACs.[78] In essence, the Court placed this law within the *Buckley* contribution category and upheld the statute with little discussion.

The post-*Buckley* decisions demonstrate that the Court will strictly scrutinize laws that impinge on first amendment rights by limiting independent campaign *expenditures*. Conversely, the Court will take a more deferential approach to *contribution* limitations.

III. *FEDERAL ELECTION COMMISSION V. NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE.*

In *Federal Election Commission*, the Court reaffirmed that it will not accept independent expenditure limitations which impermissibly infringe upon basic first amendment rights. Yet, before reaching a decision on the constitutionality of section 9012(f), the Court denied the Democrats' standing.[79] The Court allowed only the FEC the right to bring a declaratory action to test the constitutionality of the Fund Act.[80]

A. *Standing*

Justice Rehnquist discounted the Democratic Party's request to bring an action against another private party, because Congress did not expressly include this group in the statute's list of eligible plaintiffs.[81] Justice Rehnquist's rationale in denying the DNC and Mr. Mezvinsky standing, on the other hand, combined interpretations of sections 437c(b)(1),[82] 9010,[83] and 9011,[84] to find that under the present circumstances these plaintiffs could not bring a declaratory action to determine the constitutionality of section 9012(f).

Crucial to Justice Rehnquist's determination of the effect of these laws was his interpretation of the word "appropriate" in section 9011(b)(1).[85] He set forth that Congress intended "appropriate" actions to include only private suits against the FEC.[86] According to the Justice, a judicial grant of standing to the Democrats would seriously

78. *Id.* at 198.

79. 105 S. Ct. at 1465. Because the Court's interpretation of the statute denied the Democrats' standing, the Court refused to reach the Article III issue analyzed by the lower court.

80. 105 S. Ct. at 1464. *See* 26 U.S.C. § 9011(b)(1) (1982); *see also supra* note 19.

81. 105 S. Ct. at 1464.

82. U.S.C. § 437c(b)(1) (1982) (gives the FEC "exclusive primary jurisdiction with respect to the civil enforcement of such provisions").

83. 26 U.S.C. § 9010(a) (1982) (grants the FEC the power "to appear in and defend against any action filed under section 9011").

84. *See* 26 U.S.C. § 9011(b)(1) (1982); *see also supra* note 19.

85. 105 S. Ct. at 1464. The Court conceded that section 9011(b)(1) allows a named party to implement a suit without exhausting the administrative remedies as required by 2 U.S.C. § 437g (1982).

86. 105 S. Ct. at 1464. *See* S. REP. No. 677, 94th Cong. 6, 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 929, 934. The legislative history provided in this report states that "with the exception of actions brought by an individual aggrieved by an action by the Commission, the power of the Commission to initiate civil actions is the exclusive civil remedy for the enforcement of the provisions of the Act."

undermine the FEC's exclusive jurisdiction to enforce the Fund Act.[87] Furthermore, he noted that a grant of standing would allow millions of eligible voters the right to expedited judicial review by direct appeal under section 9011(b)(2).[88]

B. *Constitutionality of Section 9012(f)*

In part II of the decision, the Court reached the merits of the case and began a comprehensive analysis of the constitutionality issue surrounding section 9012(f). The Court first pointed out the self-proclaimed positions of the PACs as ideological organizations which advocate conservative doctrines.[89] The opinion also set forth the funding mechanisms of NCPAC and FCM.[90] As Justice Rehnquist explained, each of the PACs spent money in a totally independent manner, free from any cooperation with the Reagan team.[91] With this expository section, the majority laid the groundwork for placing PAC spending within the "expenditure" category of *Buckley*.

The Court next furnished a brief overview of the Fund Act's regulatory scope, contrasting its impact with the much broader boundaries of FECA control.[92] The Court then reviewed section 9012(f) of the Fund Act, which imposed a criminal penalty against any political committee that incurred expenses in excess of $1,000 to further the election of a presidential or vice presidential candidate.[93]

Justice Rehnquist applied the challenged law to NCPAC and FCM by placing the PACs within the congressional definition of "political committees,"[94] and determined[95] that their mode of spending fell within the definition of "qualified campaign expense."[96] Finally, the Court concluded that the expenditures of NCPAC and FCM were within the expressed prohibitions of section 9012(f).[97]

After finding that the constitutionality of section 9012(f) was di-

87. 105 S. Ct. at 1464; *see also* 121 CONG. REC. 12199 (May 3, 1976) (statement of Rep. Hayes).

88. 105 S. Ct. at 1464.

89. 105 S. Ct. at 1465. NCPAC, for instance, spent $7 million in 1980, which contributed to the defeat of four well-known Democratic senators: Frank Church (D - Idaho), George McGovern (D - S.D.), John Culver (D - Iowa), and Birch Bayh (D - Ind.). *Lawscope*, *supra* note 4, at 281.

90. The PACs solicit money from the general public and place the funds in a pool. The Board members then decide where and how to spend the contributions. The contributors have no input into these spending decisions. 105 S. Ct. at 1465.

91. *Id.* The Court even suggests that these expenditures could produce counterproductive results with regard to President Reagan's campaign. *See Buckley*, 424 U.S. at 47.

92. The Fund Act specifically governs the public financing of presidential elections. The FECA regulates all federal elections. 105 S. Ct. at 1466.

93. *Id. See* 26 U.S.C. § 9012(f) (1982).

94. *See supra* note 10.

95. 105 S. Ct. at 1466.

96. According to the Court, "[t]he term 'qualified campaign expense' simply means an otherwise lawful expense by a candidate or his authorized committee 'to further his election' incurred during the period between the candidate's nomination and 30 days after election day." 105 S. Ct. at 1466 (citing 26 U.S.C. § 9002(11) (1982)).

97. 105 S. Ct. at 1466-67.

rectly at issue, the Court began a review of this provision, using *Buckley* as the applicable precedent. The Court placed the PACs' expenditure of funds "to propagate political views"[98] under the protection of the first amendment's right to free speech.[99] The majority quoted *Buckley* to illustrate the necessity of incurring large expenses when trying to further one's political views in a highly media-saturated society.[100] The Court's first amendment analysis also included a discussion of the PACs' associational rights. Justice Rehnquist found freedom of association rights implicated[101] by examining the PACs' funding mechanism — public contributions. He accepted these groups as valuable tools for expanding the often inconsequential voice of the individual.[102]

Justice Rehnquist then discussed several prior opinions to rebut the FEC's argument that PACs' spending should be categorized as regulatable "speech-by-proxy."[103] The Court distinguished its holding in *California Medical Association*, which upheld limitations on contributions *to* PACs, rather than expenditures *by* PACs, as was the case here.[104] Moreover, Justice Rehnquist cited the special nature and history of congressional regulation over corporate activity in the election arena as the basis for differentiating the *National Right to Work Committee* opinion.[105] He agreed with the FEC that NCPAC and FCM exhibit all of the characteristics of a corporation. Yet he looked beyond these two highly professional groups, and focused on the effects of section 9012(f) upon smaller groups formed to influence the outcome of an election. He cited his concurrence in *Citizens Against Rent Control*, where the Court interpreted the scope of a challenged ordinance to include both informal neighborhood groups and extremely well-organized PACs.[106]

The next phase of the Court's analysis included an examination of section 9012(f), using strict scrutiny review.[107] The majority opinion expressly distinguished the precedential value of two prior Supreme Court rulings which applied a lenient test to superficial first amendment

98. *Id.* at 1467.

99. The Court noted that the law applies only when the expression of political views is accompanied by the expenditure of money. *Id.*

100. *Id. See supra* note 59.

101. *Id.* at 1467. *See* NAACP v. Alabama, 357 U.S. 449 (1958) (which placed the freedom of association among the Constitution's most cherished rights).

102. 105 S. Ct. at 1468. *See Buckley*, 424 U.S. at 22 (applying first amendment associational rights when groups are formed to "amplif[y] the voice of their adherents").

103. 105 S. Ct. at 1467-68. "Speech by proxy" does not receive full first amendment protection. *See California Medical Association*, 453 U.S. at 196 (where the Court placed contributions to PACs under the regulatable contribution category using a "speech by proxy" approach); *see also supra* note 57.

104. 105 S. Ct. at 1468. *See California Medical Association*, 453 U.S. at 199 (advancing contribution limitations as a valid means to preserve the integrity of the election process).

105. 105 S. Ct. at 1468. *See National Right to Work Committee*, 459 U.S. at 210; *see also* Tillman Act, *supra* note 28; Federal Corrupt Practices Act, *supra* note 30.

106. 105 S. Ct. at 1468-69. *See Citizens Against Rent Control*, 454 U.S. at 300 (Rehnquist, J., concurring). Justice Rehnquist argued that the invalidated Berkeley ordinance expressly affected the rights of small political groups, as well as large corporations. According to the Justice, the misguided intent of the Berkeley City Council was as unacceptably broad as the congressional intent here. 105 S. Ct. at 1468.

107. *Id.* at 1469-71. *See supra* text accompanying notes 55-56.

questions.[108]

The Court reiterated the importance of Congress's interest in preventing corruption or the appearance of corruption. The majority sanctioned this interest as the only identifiable compelling purpose vital enough to justify congressional regulation over political speech.[109] According to Justice Rehnquist, however, this purpose was not furthered by the means chosen, because PAC expenditures were not prearranged or coordinated with any candidate.[110] He acknowledged that independent expenditures by groups such as NCPAC and FCM could create the appearance of corruption. Nevertheless, the Justice expanded his analysis of section 9012(f)[111] past the "multimillion dollar war chests"[112] to include those smaller groups searching for a realistic and noticeable political outlet.

Justice Rehnquist also dismissed any possible justification for limiting the scope of the law.[113] The Court declined the opportunity to determine the size at which PACs would become regulatable.[114] Furthermore, the majority renounced, as "intolerably vague," the drawing of arbitrary lines between those PACs which permit contributors direct input into expenditure decisions and those PACs which fail to permit such participation.[115]

In conclusion, the Court expressly addressed the overbreadth issue. It agreed with the FEC that the law at issue did constitute a proper prophylactic measure focused at preventing large PACs from engaging in corrupt practices.[116] However, it refused to validate section 9012(f) because the statute unjustifably encroached upon the constitutional rights

108. 105 S. Ct. at 1469 (citing Connick v. Myers, 461 U.S. 138 (1983) (where the Court exhibited a deferential attitude toward a governmental employer's decision to terminate an employee) and United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (which applied a rational relation test because the Post Office's regulations were not content-based)).

109. The Court refused to accept any other government interest as "compelling." 105 S. Ct. at 1469. For other government interests rejected by the Court, see *Citizens Against Rent Control*, 454 U.S. at 298 (rejecting the asserted purpose of the law as a prophylactic measure to make known the identity of contributors). Justice White's dissent in *Federal Election Commission* suggested Congress's goal was to make public financing workable. 105 S. Ct. at 1479 (White, J., dissenting). *See also Buckley*, 424 U.S. at 57 (rejecting the reduction of skyrocketing campaign costs as a "compelling" interest); 117 CONG. REC. 42397 (1971) (statement of Sen. Taft) (mentioning a congressional purpose to hinder individuals from using an expenditure loophole to avoid the Act's contribution limits).

110. 105 S. Ct. at 1469.

111. *Id.* at 1469-70. The Court explains that "[e]ven were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, § 9012(f) is a fatally overbroad response to that evil." *Id.*

112. *Id.* at 1470.

113. *Id.* at 1470-71. *See* United States v. Vuitch, 402 U.S. 62, 71-72 (1971) (stating that a statute's constitutional validity must be upheld whenever possible).

114. 105 S. Ct. 1471. *See* 117 CONG. REC. 42398 (1971) (statement of Sen. Taft spelling out the purpose behind regulating independent expenditures).

115. *See* 117 CONG. REC. 42398 (1971) (statement of Sen. Pastore illustrating the difficulty of drawing regulatory lines in a sensitive constitutional area).

116. 105 S. Ct. at 1471.

of smaller "committee[s], association[s], or organization[s]".[117] According to the majority, section 9012(f) failed to pass the Court's "rigorous" first amendment review.[118] The majority concluded by citing the seminal overbreadth doctrine case, *Broadrick v. Oklahoma*.[119]

C. *Justice Stevens's Concurring Opinion*

In a separate opinion, Justice Stevens concurred with the majority in striking down section 9012(f).[120] He differed in theory, however, with the Court's standing determination. Justice Stevens believed that section 9011(b)(1)'s plain language[121] clearly conferred standing to the DNC. According to the Justice, however, *McCulloch v. Sociedad Nacional de Marineros de Honduras*[122] rendered any discussion of the standing issue unnecessary.

D. *Dissenting Opinions*

Justice White's dissent[123] disagreed with the majority's rulings on both the standing and constitutional issues. Justice White read the plain terms of section 9011(b)(1) to grant the Democrats' standing.[124] The Justice also disagreed with the majority's linchpin interpretation of the word "appropriate."[125] He recognized the word as qualifying only the nature of the case and not the plaintiff's identity.[126] For instance, a plaintiff could not seek a Supreme Court adjudication of damages, but could bring a lawsuit to question the Fund Act's constitutionality. His dissent accused the majority of confusing the clear intent of Congress by judicially intertwining the plain meanings of three separate election law provisions.[127]

In summary, Justice White ascertained a clear congressional intent merely to centralize the enforcement of the Acts in one administrative agency[128] and interpreted section 9011(b)(1) to grant an equal opportunity for standing upon each of the named groups.[129] He criticized the majority's standing determination[130] as a boondoggle for individuals or

117. *Id.* at 1471. *See* 26 U.S.C. § 9012(f) (1982).

118. 105 S. Ct. at 1471. The Court borrows *Buckley*'s use of the word "rigorous," 424 U.S. at 29, to illustrate the magnitude of the applicable test.

119. 105 S. Ct. at 1471 (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).

120. 105 S. Ct. at 1471 (Stevens, J., concurring).

121. Justice White's dissent further elucidated the background behind this interpretation. *Id.* at 1472 (White, J., dissenting).

122. 372 U.S. 10 (1963) (in which the Court rejected reaching a jurisdictional issue in one case because the merits of that case were disposed of in a companion opinion).

123. 105 S. Ct. at 1471 (White, J., dissenting).

124. *Id.* at 1472. *See supra* note 19.

125. 105 S. Ct. at 1471 (White J., dissenting). *See supra* note 19.

126. *Id.*

127. Justice White condemned the Court for finding in the statute "complex hidden meanings" which Congress could not have created. *Id.*

128. *Id.*

129. *See supra* note 19.

130. Justice White criticized the Court's decision requiring 9011(b)(1) parties (except for the FEC) to have a legitimate argument with the FEC before bringing suit. 105 S. Ct. at 1473 (White, J., dissenting).

groups who challenge a provision of the election laws.[131]

He then discussed his reasons for dissenting from the majority's holding that section 9012(f) was unconstitutional. Initially, he stated his disagreement with the majority opinion in *Buckley*, and criticized its "house-that-Jack-built"[132] analysis equating expenditures of money with actual speech.[133] Justice White continued to disagree with the contribution/expenditure distinction made in *Buckley*.[134] He asserted that uncoordinated expenditures could easily foster the appearance of corruption and, in support, outlined a number of situations demonstrating the close relationships existing between PACs and various campaign committees.[135]

As an alternative argument, the White dissent accepted the *Buckley* holding but classified PACs' spending as within the regulatable contribution category. According to Justice White, the financial control of PACs rests within the hands of only a few powerful PAC leaders, thus the contributing citizen never actually voices his or her political views.[136] Consequently, he supported the governmental interests behind section 9012(f), and concluded that these goals outweighed the statute's marginal interference with an individual's first amendment rights.

As a final alternate basis for dissenting, Justice White suggested that the *Buckley* holding was not applicable to the present case. He determined that, because *Buckley* invalidated only selected provisions of the FECA,[137] the Court could not cite this case as precedent for an analysis of the Fund Act. Justice White relied upon the special purpose for which Congress enacted the Fund Act[138] as a bona fide rationale for upholding section 9012(f). Justice White clearly advocated Congress's goal of closing any loophole which innovative individuals or groups might use as a subterfuge to avoid FECA's contribution limitations.[139] He also approved of Congress's intention to control the skyrocketing

131. *See* U.S. CODE CONG. & AD. NEWS *supra* note 86, at 935-36 for an illustration of Congress's intent to foster quick reviews of the election financing laws.

132. 105 S. Ct. at 1475 (White, J., dissenting).

133. *Id.*

134. For a politician's view of Justice White's skepticism with regard to expenditures, Senator Russell Long stated, "[w]hen you're talking in terms of large campaign contributions [in the context of independent expenditures] the distinction between a campaign contribution and a bribe is almost a hairline's difference." Cox, *supra* note 35, at 396.

135. 105 S. Ct. at 1476 (White, J., dissenting). *See* 113 CONG. REC. 10201 (observation by Sen. Gore that so long as unregulated expenditures are defined as being uncoordinated with the candidate, "lack of 'control' is very easy to manage").

136. *See supra* note 90.

137. *See supra* note 53 and accompanying text.

138. 117 CONG. REC. 41937, 41938 (remarks of Sen. Mansfield explaining an important congressional purpose surrounding the enactment of the Fund Act: "relieving the candidate's dependence on the gigantic economic interests within the nation [because] when someone gives us [Senators] $1,000, $2,000, $3,000, or $5,000, we spend a little more time with that guy").

139. *See* 117 CONG. REC. 42402 (remarks of Sen. Dominick for legislative history relating to expenditure limitations).

costs of campaigns.[140] According to Justice White, the legislative history demonstrated that section 9012(f) was narrowly drawn, and the majority's bifurcation of the Fund Act would destroy these valuable purposes.

Partially in agreement with Justice White, Justice Marshall filed a separate dissent.[141] His analysis contained a straightforward criticism of *Buckley* and rejected its artificial constitutional distinctions between contributions and expenditures.[142] Therefore, Justice Marshall would have held that both campaign contributions and expenditures fall within legitimate regulation by the government.

IV. ANALYSIS

A. *Standing*

The Court's denial of standing to the Democrats has unfortunate implications. It steps beyond the boundaries of proper judicial review and ventures into the realm of Congress's lawmaking power. The Court based its opinion on the fear of granting millions of people standing to challenge the Fund Act. This phobia, however, should not sanction the Court's disallowance of justiciability to parties with a sufficient "personal stake in the outcome of a controversy."[143]

The Court's intertwining of sections 437c(b)(1), 9010, and 9011(b)(1), represents a transparent exercise in judicial rhetoric. Simply stated, the Court's analysis should have concentrated solely upon section 9011(b)(1) which clearly granted standing to the Democrats.[144] While the legislative history may support the majority's interpretation of section 437c(b)(1),[145] which requires exhaustion of administrative remedies, Congress failed to exhibit such motivation when enacting section 9011(b)(1).[146] In fact, by expressly naming three groups within the Fund Act's provision, the lawmakers plainly mandated their intent to grant each party a coequal right to file a lawsuit.[147]

The Court usually construes standing strictly when faced with a constitutional attack upon a statute.[148] An exception arises, however, when Congress expressly provides for judicial review.[149] For example,

140. 105 S. Ct. at 1480 (White, J., dissenting).
141. *Id.* (Marshall, J., dissenting).
142. *Id.* at 1481.
143. *Buckley*, 424 U.S. at 11 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
144. 26 U.S.C. § 9011(b)(1) (1982). *See supra* note 19.
145. *See* U.S. CODE CONG. & AD. NEWS *supra* note 86, at 934, 936.
146. *See* Ifshin & Warin, *supra* note 31, at 502.
147. 105 S. Ct. at 1472 (White, J., dissenting).
148. Bread Political Action Comm. v. Federal Election Commission, 455 U.S. 557 (1982); Keefe, *It's Tough to Get "Standing" and "Ripeness" These Days*, 67 A.B.A. J. 228 (1981); Note, *Standing to Challenge the Constitutionality of the FECA: The Effect of a Congressional Attempt to Relax Standing Requirements*, 65 GEO. L.J. 1231, 1235 (1977).
149. Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) (even though the Court held that the Sierra Club did not have standing to sue federal officials in this case because neither the club nor its members suffered any injury, it stated that, in other situations, standing can be gained by an express grant of Congress).

in *Buckley*, the Court opted for a relaxed standing test, in deference to the congressional grant.[150] Because Congress explicitly granted standing to individuals eligible to vote and national committees of political parties,[151] their standing should have been upheld by the Court.

Moreover, the Court erred in not bringing the overbreadth doctrine to its logical conclusion. The application of this doctrine normally allows a relaxation of the standing requirement.[152] To meet the standard, the plaintiff must only assert a legitimate claim of actual harm or, in the alternative, a threat of definite harm in the future.[153] Because of their historical inability to keep pace with Republican Party capitalization,[154] the Democrats will undoubtedly suffer a substantial threat of future harm if section 9012(f) does not remain in effect.

Finally, the Court should remain flexible and mold judicial standing requirements to protect those who have been or will be harmed by an unconstitutional law.[155] Unfortunately, the present ruling deprives more than just the two politically active groups involved here from litigating the constitutionality of the Fund Act in the future. An unrealistic fear of a massive litigant invasion descending upon the high Court cannot justify deprivation of an express grant of standing.

B. *Constitutionality of Section 9012(f)*

The Court's decision on the merits truly furthered the constitutional rights of politically active citizens. The traditionally conservative members of the Court, joined by Justice Brennan, openhandedly applied the Constitution to protect the interests of the little guy. The Court struck down every justification for section 9012(f) by using an overbreadth interpretation.

As the *Buckley* opinion noted, individuals can hardly voice their political views today without spending large sums of money.[156] Justice Rehnquist eloquently applied this reasoning to allow small groups of individuals the opportunity to combine efforts and money to compete with wealthy fat cats who can personally afford to bankroll a candidate's bid for election.[157]

Furthermore, even though large PACs engage in "speech by

150. *See supra* note 148.

151. 26 U.S.C. § 9011(b)(1) (1982). *See supra* note 19.

152. When an overbroad statute may chill protected free speech, the Court has found that potential litigants must be allowed the opportunity to challenge the law. *See* Secretary of State of Md. v. Joseph H. Munson Co., 104 S. Ct. 2839, 2846 (1984).

153. Bigelow v. Virginia, 421 U.S. 809, 816 (1975), quoting NAACP v. Burton, 371 U.S. 415, 433 (1963) (applying a relaxed standing requirement because the challenged law had potential for "sweeping and improper applications").

154. *See* Cox, *supra* note 35.

155. J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (a stockholders' derivative suit was allowed "to provide such remedies as are necessary to make effective the congressional purpose").

156. *But see* Comment, *supra* note 29, at 427; Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1003 (1976).

157. *See* 105 S. Ct. at 1467; *see supra* text accompanying note 46.

proxy,"[158] smaller political groups, whose members control spending decisions, directly voice their beliefs. The Court correctly ruled against expenditure limits to protect the direct political expression of all groups. At the same time, the FEC properly classified NCPAC and FCM as corporations, which are historically subject to legislative control.[159] The Constitution, however, protects all types of associations, and the Court rightfully placed smaller organizations beyond the permissible scope of congressional regulation.

It is well established that when fundamental rights are infringed, strict scrutiny applies.[160] The Court has recognized only one compelling interest[161] and that is to guard the election process from corruption or the appearance of corruption. The Court did not accept any other interest as compelling, agreeing with the *Buckley* Court's rejection of interests such as "the mere growth in the cost of federal election campaigns . . . ."[162] The Court correctly refused to sanction any new governmental interests because of its commitment to protect neighborhood political groups.

At the means end of the spectrum,[163] Justice Rehnquist reiterated *Buckley*'s rejection of utilizing expenditure limitations to control corruption.[164] On the other hand, a variety of commentators, including Justice White, voice legitimate concern over this decision.[165] Each of these critics believe that both expenditures and contributions breed corruption.[166] They support congressional motives to protect campaign integrity as being equally applicable to independent expenditures and contributions. Nevertheless, these individuals fail to grasp the broader benefits of the majority's opinion. Small organizations cannot possibly have a significant effect upon any evil that Congress finds necessary to control. Even if large, highly-organized PACs foster the appearance of corruption, a small faculty group forming a political committee[167] does not necessarily reflect such evil doing. Section 9012(f), however, regulated the activities of both. The Court properly administered a dose of overbreadth's "strong medicine"[168] to destroy this unjustified infringement on first amendment rights.

Finally, by refusing to limit the scope of section 9012(f), the Court sent a none too subtle message to Congress. When Congress has enacted a statute using its high degree of expertise in an area, the Court

158. *See supra* text accompanying note 100.

159. *See supra* text accompanying notes 28-34; *cf.* Cox, *supra* note 35, at 409; *Recent Decisions*, *supra* note 57, at 814.

160. *See supra* text accompanying notes 54-56.

161. *See supra* note 109.

162. *Buckley*, 424 U.S. at 57; *see also supra* note 109.

163. *See National Right to Work Committee*, 459 U.S. at 208.

164. *See supra* text accompanying note 61.

165. *See* 105 S. Ct. at 1476 (White, J., dissenting); Cox, *supra* note 35, at 409; *Recent Decisions*, *supra* note 57, at 815; Note, *supra* note 12, at 977.

166. *See supra* note 139.

167. *See supra* note 115 (statement of Sen. Pastore).

168. *Broadrick*, 413 U.S. at 613.

will generally exercise great deference in reviewing the law.[169] Federal statutes regulating speech and association normally hold a presumptively valid status.[170] Moreover, where Congress has expressly considered the constitutionality of the law under review,[171] the judiciary respects the legislative decision.[172] However, because of Congress's blatant attempt to step beyond constitutionally permissible boundaries, the Court pointedly refused to apply these precepts in limiting section 9012(f)'s impact. The underlying message of the opinion suggested that Congress must modify the Act, using its legislative and political expertise to regulate only those groups which illegitimately corrupt the election process.

CONCLUSION

Every citizen holds an allegiance to a special interest: farmers believe in government subsidies, students advocate financial aid, and environmentalists wish to protect nature. The Supreme Court has protected the amplification and advocation of many interests in *Federal Election Commission v. National Conservative Political Action Committee*. Obstacles to the direct expression of one's view, in conjunction with the voices of others of similar opinion, will no longer hinder free political speech.

Congress has the power to regulate large, highly-organized PACs,[173] and the Court has challenged it with the opportunity to amend section 9012(f). Congress must seize upon this opening and narrow the scope of election finance regulation. When Congress meets this challenge, a proper balance will be struck between legitimate lawmaking power and first amendment protection.

David C. Puchi

169. Burroughs v. United States, 290 U.S. 534 (1934) (affirming the congressional power to regulate presidential and vice-presidential elections).

170. Flemming v. Nestor, 363 U.S. 603, 617 (1960).

171. *See supra* note 115.

172. Rostker v. Goldberg, 453 U.S. 57 (1981).

173. *See supra* text accompanying notes 28-34.